

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, : Civil Action  
: No. 1:11-cv-00948  
Plaintiff, :  
: September 8, 2011  
v. : Morning Session  
: Washington, D.C.  
H&R BLOCK, INC., et al., :  
Defendants. :  
.....:

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING - DAY 3  
BEFORE THE HONORABLE BERYL A. HOWELL  
UNITED STATES DISTRICT COURT JUDGE

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25 Proceedings reported by machine shorthand, transcript  
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I N D E X

| <u>WITNESS</u>   | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|------------------|---------------|--------------|-----------------|----------------|
| LANCE DUNN       |               |              |                 |                |
| By Mr. Wayland   | 5             |              | 105             |                |
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E X H I B I T S

| <u>NUMBER</u>        | <u>MARKED FOR IDEN</u> | <u>ADMITTED</u> |
|----------------------|------------------------|-----------------|
| GOVERNMENT EXHIBITS: |                        |                 |
| Trial Exhibit 7      |                        | 17              |
| Trial Exhibit 8      |                        | 25              |
| Trial Exhibit 9      |                        | 105             |

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P R O C E E D I N G S

THE DEPUTY CLERK: This is Civil Action 11948, United States of America v. H&R Block, et al.

THE COURT: One of the things I was remiss about yesterday, although I promised to talk about timekeeping in the mornings, I didn't do that yesterday. So do the parties want to put on the record what their lapsed time is.

Have you all agreed upon that?

MR. WAYLAND: I don't think we have it right at hand, but we can do that at a break, your Honor. We're keeping track.

MR. ROBERTSON: We've been watching it, your Honor, and I think we're all fine. I think by taking out a couple witnesses in the middle, that that's helping with the time. So I think that we're fine. In fact, it may be that if things roll fast enough today, that we won't be taking all day tomorrow as we mentioned.

THE COURT: Right. Okay.

MR. WAYLAND: So today's schedule is we'll finish our examination of Mr. Dunn. Then the defendants will put him on. And this afternoon we have Dr. Rick Warren-Boulton, who is our expert, and then we'll rest, your Honor.

THE COURT: Okay. So you are not going to call the other witnesses who are on your original list.

MR. WAYLAND: The two IRS witnesses, they were the

1 subject of a stipulation so that we didn't have to call them.

2 THE COURT: Great. And you're not going to call  
3 Dr. Dhar?

4 MR. WAYLAND: Dr. Dhar is a rebuttal witness, your  
5 Honor, is as Dr. Z. I don't want to mispronounce his name, but  
6 everyone calls him Dr. Z. You may call him Dr. Z too, your  
7 Honor.

8 THE COURT: I'm glad to hear that. All right.  
9 Excellent.

10 MR. WAYLAND: May I call Mr. Dunn back to the stand?

11 THE COURT: Yes.

12 MR. WAYLAND: Mr. Dunn.

13 THE COURT: Good morning, Mr. Dunn. I remind you you  
14 remain under oath.

15 DIRECT EXAMINATION (Resumed)

16 BY MR. WAYLAND:

17 Q Good morning, Mr. Dunn.

18 A Good morning.

19 Q Just a short examination this morning, Mr. Dunn, before I  
20 turn you over to your counsel.

21 If you remember yesterday, we went through a series of  
22 documents/memoranda that were prepared in connection with  
23 companies accessing the capital markets that are looking for  
24 investors?

25 A Yes.

1 Q And we started with 2004 and we went through 2009. I want  
2 to show you one more of those documents, sir, and that's at  
3 Tab 20. It's Government Exhibit 241.

4 All right. Sir, at Tab 20, Government Exhibit 241, is a  
5 Project Franklin information memorandum. It's prepared for the  
6 company by Jefferies, correct?

7 A Yes.

8 Q And what is Jefferies & Company?

9 A Jefferies is an investment banking firm that represented  
10 2nd Story Software and TA in the latest rounds of process  
11 negotiations.

12 Q And TA is the firm that has an ownership interest in the  
13 company?

14 A Correct.

15 Q All right. We're just going to look at two pages in this  
16 document. The first is at page 13. I guess it's 12. I'm  
17 sorry. Page 12.

18 And you'll see the top of the document from October 2010  
19 says, "Competitive Landscape and 2SS Differentiation."

20 Do you see that?

21 A Yes.

22 Q And the first -- and then there are a number of bullet  
23 points under this heading. The second one says, "We know free."  
24 And under that category, heading, you say, "2SS was the first  
25 company to offer free tax preparation solutions and has done so

1 for over 12 years. As a result, the company has deep, proven  
2 expertise in developing, marketing and maximizing the value of  
3 a free product."

4 And that deep, proven expertise was developed over the 12  
5 years, correct?

6 A Yes.

7 Q All right. And down at the bottom of the page is a heading  
8 "Trusted Brand." And the last sentence says, "With over  
9 12 years of building reliable, robust software solutions, 2SS  
10 has created a valuable brand within the online tax preparation  
11 market."

12 Do you see that?

13 A Yes.

14 Q And that was correct when you put it in the offering memo of  
15 October of 2010, right?

16 A Yes.

17 Q And the trusted brand was built over 12 years of hard work,  
18 right?

19 A Yes.

20 Q Okay. If you'd turn the page, sir, we're still under the  
21 heading "Competitive Landscape and Differentiation" in October  
22 of 2010. You see under Exhibit 8, there is a chart. It has  
23 consumer tax preparation software, product comparison. And  
24 you've listed three companies: 2nd Story, which is TaxACT, H&R  
25 Block and Intuit, correct?

1 A Correct.

2 Q And you haven't listed any of the other value competitors  
3 that we see on the chart from yesterday, correct?

4 A Correct. And as I mentioned yesterday, information about  
5 them is not available publicly for potential investors to  
6 analyze.

7 Q Could you even say, "Gee, we've got these two really  
8 important value competitors out there. Can't tell you very much  
9 about them but they're out there, and they're really who we  
10 really compete with, not these people"?

11 A I'm sure that we talk about that during our management  
12 presentation, yes.

13 Q And concluded that it was more accurate to describe H&R  
14 Block and Intuit as your competitors than Free Tax and  
15 TaxSlayer? Is that what you talked about?

16 A As I mentioned yesterday, you know, with this document being  
17 mailed out to in bulk to many private equity firms, yes, we need  
18 to differentiate ourselves from the ones that they're going to  
19 immediately compare us with.

20 Q Even though you're not competing with those.

21 Why didn't you just say, "Don't worry about these two, we  
22 don't compete with them, they're in a different market"?

23 A That is one of the points of this whole document as well as  
24 the management presentation that would follow. We talk about,  
25 you know, being the value leader, and we talk about our business



1 model and how we utilize free and how that makes us different  
2 and word of mouth.

3 You know, if you read the document as a whole, it does make  
4 the point that we are different and that's why we don't really  
5 compete with them, and that's why we continue to carve out the  
6 niche as the value leader.

7 Q Actually, this is about a different marketing strategy and  
8 that's how you compete with them, right? You're saying you've  
9 got your prices listed right here. Your price is lower than  
10 their price.

11 Isn't that how you differentiate yourself?

12 A That's a key element of the value model, yes.

13 Q Exactly. All right, sir. And we can put that aside.

14 Now, as you said just now, that you -- comparing prices is a  
15 way to differentiate yourself. You do over -- been tracking and  
16 worrying about the prices of Intuit and H&R Block, right, over  
17 the years?

18 A We track them, but we don't really worry about them unless  
19 we're to see them drop down to our level.

20 Q I'm sorry?

21 A We don't look at their prices and establish our prices.

22 Q Don't you market directly -- don't you have direct price  
23 competition in your ads?

24 A We -- you know, we're targeting 140 million taxpayers so,  
25 yes, we do find that we need to differentiate our message

1 against certainly the message of Intuit. As I mentioned  
2 yesterday, the average taxpayer is going to see an Intuit or a  
3 TurboTax ad 30 times to our one. It's critically important that  
4 we get our value message across in the one time that they see  
5 our ad.

6 Q So if you run an ad that has your price versus TurboTax,  
7 isn't that price competition?

8 A It's a price comparison.

9 Q What's the difference between price comparison and price  
10 competition?

11 A We don't set our prices based on their price.

12 Q But you're trying to sell a product to a consumer and you  
13 have ad that has two different prices, and the only difference  
14 in the price are your price and TurboTax's.

15 Isn't that price competition?

16 A We're trying to make pricing transparent. As I've said, you  
17 know, a key component of the value proposition is to show a  
18 consumer that price should be a key determinant in their  
19 purchase decision, and they should be aware of what pricing is  
20 as they're making that decision.

21 For example, for state prices, it's very difficult to know  
22 what TurboTax or Block's state price is. And so we feel that it  
23 is important to differentiate and to separate the value model  
24 from the premium model by pointing out, you know, make sure you  
25 know what you're getting into.

1           THE COURT: I have to say that I'm finding it a  
2 little -- I'm puzzling over what the difference is between  
3 price -- how price comparison isn't price competition. And I'm  
4 trying to listen carefully to your answer to figure out why  
5 that -- why we're hearing a lot of words from you in response to  
6 a fairly simple question: Isn't price comparison price  
7 competition?

8           Are you saying that it's not? Is that what I'm  
9 supposed to understand from your response?

10          THE WITNESS: Yeah. We do differentiate from other  
11 products by price, yes. It is a key --

12          THE COURT: And you don't view that as price  
13 competition?

14          THE WITNESS: We don't set our prices based on someone  
15 else's price.

16          THE COURT: You only view it as price competition if  
17 you look at the prices that Intuit or H&R Block are offering  
18 their products at in order to set your prices?

19          THE WITNESS: Yes. We set our price on the proposition  
20 that we feel our customers are going to respond to. And having  
21 a value conscious, price conscious customer base is the key  
22 thing in how we set our prices. We don't look at what Intuit  
23 and Block are doing for their prices. We need to monitor them.

24          THE COURT: Okay. But also, I mean, Intuit and H&R  
25 Block clearly offer free products as well so, you know, that's

1 the same price -- free -- that you offer a number of your  
2 products.

3 THE WITNESS: Yes.

4 THE COURT: But the fact that they offer free products  
5 is also not something that you would look to in terms of price  
6 comparison in order to determine how you're going to compete  
7 against them?

8 THE WITNESS: You know, we certainly try to  
9 differentiate our free product from their free product as well  
10 so, yes, we do differentiate ours based on price. So if you  
11 believe that's price competition, then yes.

12 THE COURT: Well, I think -- Mr. Wayland, sorry for the  
13 interruption.

14 MR. WAYLAND: That's fine, your Honor. I'm having the  
15 same set of questions. I'm trying to understand.

16 BY MR. WAYLAND:

17 Q If I'm a consumer, sir -- and you try to put yourself in the  
18 position of consumers and figure out what it is that they're  
19 going to respond to, correct?

20 A Yes.

21 Q If I'm a consumer and I see an ad from TaxACT and the ad has  
22 a price point for TurboTax and then it says, "But look at our  
23 price, it's lower," as a consumer, don't you want me to come to  
24 you because you have a lower price?

25 A Yes. You want them to make an informed decision.

1 Q And that's price competition, isn't it?

2 A Yes.

3 Q All right, sir. Let's look at a couple of documents.

4 If you look at Tab 32. This is Government Exhibit 28-14.

5 And it is an e-mail from Kristen Peterson at TaxACT.

6 What is her position?

7 A Kris Peterson is vice president of marketing.

8 Q And it's an e-mail to you and others. Cammi is the person  
9 you described yesterday. She was in charge of marketing for a  
10 while, correct?

11 A She still is in charge of marketing. She is the chief  
12 marketing officer.

13 Q She was one of the founders?

14 A Yes.

15 Q And this is an e-mail which they're transmitting to you some  
16 information about TurboTax's pricing, correct?

17 A Yes.

18 Q This is the kind of information that would get transmitted  
19 to you from time to time at the company?

20 A Occasionally.

21 Q Let's look at Exhibit 33 which follows. It's Tab 33, sir.  
22 It's Government Exhibit 28-15.

23 This is an e-mail from you to a number of people at TaxACT.  
24 And it attaches an H&R Block notice about new product with no  
25 price increase.

1 Do you see that?

2 A Yes.

3 Q And you thought that was important enough to distribute to  
4 some of your fellow executives, correct?

5 A I do generally forward everything that I get from TA to my  
6 partners, yes.

7 Q All right. And this had been provided to you by  
8 Mr. Crockett at TA. And who is Mr. Crockett?

9 A He is a managing partner at TA Associates and on my board of  
10 directors.

11 Q So he's on the board of directors, and he think it's  
12 important enough to bring to your attention an ad from H&R Block  
13 regarding pricing and product improvement, correct?

14 A About marketing messaging, yes.

15 Q All right, sir. Let's turn back to Tab -- I'm sorry. Hold  
16 on. Tab 34.

17 You know what, before we go there, there's one other place I  
18 want to go first so we'll hold off on Tab 34 and we'll go to  
19 Tab 8, sir.

20 Now, when the two companies were coming to the Department of  
21 Justice to explain the transaction, you attended some of those  
22 meetings -- one of those meetings?

23 A Yes.

24 Q You attended a meeting on November 10th, 2010?

25 A Yes.

1 Q And what we have in front of you is Government Exhibit 28-2.  
2 And that's the presentation that was made on behalf of the  
3 companies on November 10th, 2010, which was testified about by I  
4 think Mr. Bennett as well.

5 If you would go the page 5. At the top, the heading is  
6 "H&R Block Seeks to Compete More Effectively Against TurboTax."  
7 And then the second bullet point from the bottom says, "TaxACT  
8 provides better value than TurboTax's value products."

9 Do you see that, sir?

10 A Yes.

11 Q And that was part of the presentation that was made to the  
12 government in November 2010.

13 And how does that fit under the chart that you've created  
14 for us, sir?

15 A I did not agree with the value premium definition of this  
16 document.

17 Q And you were sitting at the meeting when it was presented to  
18 the government, correct?

19 A I was given this document an hour before that meeting  
20 started, yes.

21 Q All right. And you were there when they went over the  
22 information and the material, correct?

23 A I was there.

24 Q All right. Now, let's go to page 14.

25 All right, sir. And this is a chart that says, "H&R Block

1 and TurboTax offer higher priced products as compared to TaxACT  
2 and other value providers." And then there's a table: Premium  
3 versus value, tax preparation providers.

4 Not too much different than the chart we created yesterday  
5 except that under value tax preparation providers, the  
6 presentation that was made to the government in November of 2010  
7 says H&R Block and TurboTax under value tax preparation  
8 providers, correct?

9 A It does say that, yes.

10 Q And I guess you don't agree with that either, sir, right?

11 A I do not.

12 Q And did you agree November 2010?

13 A I believe I made the point to my attorney.

14 Q After the meeting?

15 A No, before.

16 Q All right. But you didn't say anything at the meeting. You  
17 let the people go through it and say, "Hey, tell the government  
18 what's in there. I don't agree with it, but I'll keep my mouth  
19 shut"?

20 A Yes. The meeting was already scheduled.

21 Q It wasn't scheduled -- it wasn't supposed to be a lying  
22 meeting, though, was it? It was a meeting. Nobody said you had  
23 to allow people to say things that you didn't believe in,  
24 correct?

25 A Yes.



1 Q All right, sir. Let's look at a document we looked at  
2 yesterday, and that is at Tab 34. This is Government Exhibit  
3 28-19. It's 2009 Competitive Price Comparison.

4 I believe your testimony yesterday, sir, was that you'd  
5 never seen this before, and it wasn't prepared during the  
6 ordinary course of business, right?

7 A Correct.

8 Q I'm going to hand to you, sir, a document we've marked as  
9 Government Trial Exhibit No. 7, with the Court's permission.  
10 And I'll hand it up. It's not in the book, your Honor. May I  
11 do so?

12 THE COURT: That's fine. You may approach the witness.

13 (WHEREUPON, a certain document was marked Trial Exhibit 7  
14 for identification as of September 8, 2011.)

15 BY MR. WAYLAND:

16 Q Now, Mr. Dunn, you have not seen Government Exhibit Trial 7  
17 before. What this is is the information that was provided by  
18 your counsel to us that comes with all of the documents. So  
19 when we -- it will take me a moment to set this up for you just  
20 so you understand what it is, sir.

21 When your attorneys produced documents to us, each document,  
22 the way they were produced electronically, comes with some  
23 information. And this is the information that was given to us  
24 by your attorneys. And what this says, sir, is that at the top,  
25 the custodian for the document that's in front of you -- that's

1 the Government Exhibit 28-19 -- came from -- you were the  
2 custodian of that document, sir. And as well, there were some  
3 other custodians, a number of people, many of whom are the  
4 senior executives of the firm.

5 And assuming that that's correct, as we believe it is, do  
6 you have any explanation as to why this document was produced  
7 from your files?

8 MR. ROBERTSON: Counsel, objection; leading. I'm  
9 looking at it, and I see a different page number, a different  
10 document.

11 MR. WAYLAND: Actually, turn -- I can put a witness on  
12 the stand, your Honor, if we need to to connect this up.

13 THE COURT: Mr. Wayland, could you just alert each of  
14 us as to where you're looking to connect this Government Trial  
15 Exhibit 7 to Government Exhibit 28-19, which may enlighten both  
16 Mr. Robertson and me.

17 MR. ROBERTSON: Your Honor, all these documents have a  
18 number at the bottom.

19 THE COURT: I see TA00088.

20 MR. ROBERTSON: TA is TA Associates. That's not  
21 2nd Story.

22 MR. WAYLAND: The way this works, your Honor, the  
23 actual -- because we had to do this quickly last night after he  
24 said he hadn't see it before, we -- there were different  
25 versions -- things are produced with different numbers, so we

1 went back and we found the actual sheet that matches the  
2 document. And if you look at the final -- the second-to-last  
3 page of the document, you'll see that there's actually an  
4 excerpt from the document, online price. It has comparisons.

5 In any event, if we need to, your Honor, we will -- we can  
6 put on a witness later and explain the providence of the  
7 document. But let me do it this way, your Honor, so we don't  
8 take the Court's time at this point.

9 THE COURT: Well, I mean, I have to say, Mr. Wayland, I  
10 have to agree with Mr. Robertson that I don't see any document  
11 identification number of TA00088 that associates it with Trial  
12 Exhibit 7. I do note that Trial Exhibit 7 appears to show that  
13 a document with the file name "Competitiveanalysis2009.xlsx" was  
14 found on Lance Dunn's hard drive, but clearly it's unclear from  
15 this document that that document with that file name is the same  
16 document labeled TA00088.

17 I think that's your point, Mr. Robertson; am I correct?

18 MR. ROBERTSON: Yes, your Honor.

19 MR. WAYLAND: That's fine. I understand. We'd have to  
20 put a witness on the stand to make the connection between this  
21 document and that document, which we didn't think we'd have to  
22 do since we had understood it came from his files. But we're  
23 going to pass on that.

24 MR. ROBERTSON: That's why I interjected because he  
25 said counsel said had produced the documents from his files and

1 plainly, I didn't do that.

2 THE COURT: Am I recalling correctly from yesterday  
3 that Mr. Dunn says that he doesn't see documents like this?

4 MR. WAYLAND: That's my recollection. I'll ask some  
5 more questions, your Honor.

6 THE COURT: Thank you.

7 BY MR. WAYLAND:

8 Q So is it your testimony, sir, that you've never seen this  
9 document, you don't get these kinds of documents, nobody in the  
10 company gets these kinds of documents?

11 A I testified that I did not see this document.

12 Q And do you have any -- if it was produced from your files --  
13 and we have to establish that somehow -- would you have any  
14 explanation of how it got there?

15 THE COURT: Mr. Wayland, could you just slow down for a  
16 second. You asked a compound series of questions.

17 MR. WAYLAND: All right.

18 THE COURT: And he answered to only one part of your  
19 compound question.

20 MR. WAYLAND: All right, your Honor. I understand.

21 THE COURT: Could you ask each of your individual  
22 components because each of them is important.

23 MR. WAYLAND: I understand, your Honor.

24 BY MR. WAYLAND:

25 Q So just we'll take this step by step, Mr. Dunn.

1           Your testimony is the same today as it was yesterday, which  
2   is that you don't have any recollection of having seen this  
3   document before, correct?

4   A   That is correct.

5   Q   And you don't have any -- if it was produced from your  
6   files, you don't have any knowledge as to how it got there,  
7   correct?

8   A   No.

9   Q   And if it was produced from the files of other senior  
10   executives, you don't know one way or the other why they would  
11   have it, correct?

12   A   No.

13   Q   All right. And your testimony today is this is not a  
14   document that was produced in the ordinary course of business?

15   A   That's correct.

16   Q   If it were -- would you have any idea of why somebody at  
17   TaxACT would have produced this document?

18   A   No.

19           MR. ROBERTSON: Objection, your Honor. I think we're  
20   still unclear as to which document we're talking about.

21           MR. WAYLAND: We're talking about 28-19.

22           THE COURT: I understand we're talking about  
23   Government Exhibit 28-19.

24           MR. ROBERTSON: It is the one from TA Associates.

25           MR. WAYLAND: He's the owner of TaxACT, your Honor. We

1 understand that. We're not talking about this document. The  
2 Judge asked me to go through a series of questions to establish  
3 his knowledge about this document. If there is any connection  
4 here, I'm trying to do that.

5 THE COURT: And Mr. Robertson, you make a very good  
6 point. Part of the reason he may not be familiar with this kind  
7 of chart, he may not have seen this kind of chart, the reason  
8 that he -- he's testifying that this is not the kind of chart  
9 produced in the ordinary course of business at 2SS is because  
10 this was the kind of chart produced by, as I understand, TA is  
11 the equity investor in 2SS?

12 THE WITNESS: Yes.

13 THE COURT: And so perhaps that is -- and you can  
14 clarify that on your cross-examination.

15 MR. ROBERTSON: Yes, your Honor. But my objection was  
16 he just said that it was this 28-19, the TA document. "How did  
17 it end up in your files?"

18 MR. WAYLAND: I didn't say that. I said, "If it were  
19 in your files."

20 THE COURT: Let's just move on.

21 MR. WAYLAND: Thank you, your Honor.

22 BY MR. WAYLAND:

23 Q All right, sir. So what's the role of TA Associates with  
24 respect to 2nd Story Software?

25 A They are a majority owner in 2nd Story Software.

1 Q And do you know one way or the other whether anybody at TA  
2 is in the practice of compiling competitive price comparison  
3 charts?

4 A No.

5 Q Where would they get the information to compile the  
6 competitive price comparison chart?

7 A I would say a lot of this information -- all this  
8 information -- is available on the Internet looking at the  
9 products.

10 Q Can you identify somebody at TA Associates who you think  
11 would be tasked with preparing competitive price comparisons and  
12 product comparisons?

13 A No.

14 Q Can you think of any reason why somebody there would be  
15 doing that and not actually dealing with somebody at your  
16 firm?

17 A My guess would be somebody in an investment bank prepared  
18 this.

19 Q Somebody in an investment bank prepared this. That's your  
20 testimony now?

21 A I don't -- I really don't know. You asked me, you know, if  
22 I knew of anybody or how it might come to exist. That would be  
23 my best guess.

24 Q You see it's more than just a price comparison. It goes on  
25 to have a competitive positioning statement on the second page.

1 Do you see that?

2 A Yes.

3 Q Was somebody at TA tasked with understanding the competitive  
4 position of TaxACT, H&R Block and TurboTax?

5 A I don't know.

6 Q And do you see at the next page is the data import  
7 comparison.

8 That requires a fairly detailed knowledge of the product;  
9 don't you think?

10 A I believe this would all be available on the Internet,  
11 yes.

12 Q All right. But you can't tell me why anybody at TA  
13 Associates would be on the Internet making up charts of  
14 competitive positioning or data import comparison, right?

15 A No, I cannot.

16 Q All right, sir. Let's look at the last tab in the book at  
17 Tab 51. This is Government Exhibit 28-35.

18 MR. ROBERTSON: Your Honor, if counsel can provide me  
19 with Tab 51. I don't have a Tab 51.

20 MR. WAYLAND: I'm sorry. It's not in the book yet.  
21 It's Government Exhibit 28-35.

22 May I hand it to the witness and the bench, your Honor?

23 THE COURT: Yes, please.

24 BY MR. WAYLAND:

25 Q Now, Mr. Dunn, what's marked as Government Exhibit 28-35 is



1 you'll see a document entitled "2010 Comparative Price  
2 Comparison."

3 Do you see that, sir?

4 A Yes.

5 Q Have you ever seen this document before?

6 A No.

7 Q It's still your position that the company doesn't produce  
8 competitive price comparisons in the regular course of  
9 business?

10 A I don't know who prepared this.

11 Q It looks pretty similar to the 2009, doesn't it?

12 A It's a lot more abbreviated and includes TaxSlayer.

13 Q And that includes Staples on the right side. In 2010, you  
14 started doing business at Staples, right?

15 A Yes.

16 Q All right.

17 A Avanquest did.

18 Q All right, sir. The last thing I want to talk to you about  
19 is a videotape so let's watch a video. If you look right on  
20 your screen, it will be right up on the video. This is  
21 Government Trial Exhibit No. 8.

22 (WHEREUPON, a certain document was marked Trial Exhibit 8  
23 for identification as of September 8, 2011.)

24 (Videotape played.)

25 MR. WAYLAND: Let's just run that again because it went

1 by very quickly.

2 (Videotape played.)

3 BY MR. WAYLAND:

4 Q Mr. Dunn, have you seen this ad before?

5 MR. ROBERTSON: We have not received this. It's not on  
6 the exhibit list. I'd like to know if we have it.

7 Thank you.

8 MR. WAYLAND: This is Government Trial Exhibit No. 8.

9 May I hand this to your Honor?

10 THE COURT: You can give it to my courtroom deputy.

11 And is the only thing on this CD --

12 MR. WAYLAND: Yes, your Honor.

13 THE COURT: -- this single video?

14 MR. WAYLAND: I'll make a record of it, your Honor.

15 What we've entered as Government Trial Exhibit No. 8 is a video  
16 clip of a TurboTax/TaxACT comparison which we played for the  
17 Court.

18 THE COURT: And has this been previously disclosed to  
19 the defendants as being --

20 MR. WAYLAND: I'll lay some more foundation, your  
21 Honor.

22 THE COURT: Okay.

23 BY MR. WAYLAND:

24 Q Have you seen this ad before?

25 A Yes.

1 Q Is it a TurboTax ad? I mean, Turbo TaxACT ad?

2 A It is a TaxACT ad, yes.

3 Q All right, sir. And let me show you what we've marked as  
4 Government Exhibit 959.

5 Sir, what we've handed to you is Government Exhibit 959.  
6 It's an e-mail from Kris Peterson to Lance Dunn and others. And  
7 it has an attachment which is an HTM site.

8 And then attached to that are a series of screenshots from  
9 the ad we just saw, correct?

10 A Correct.

11 MR. WAYLAND: Your Honor, I have no more questions of  
12 Mr. Dunn.

13 MR. ROBERTSON: Your Honor, may I inquire?

14 THE COURT: Yes, please.

15 MR. ROBERTSON: You'd think having a smaller lectern  
16 was supposed to keep us from having so many documents, but it  
17 hasn't worked.

18 CROSS-EXAMINATION

19 BY MR. ROBERTSON:

20 Q Good morning, sir.

21 A Good morning.

22 Q And I just want to be clear. Have we talked about your  
23 testimony at all since you were on the stand yesterday?

24 A No.

25 Q Okay. The apples-to-apples comparison, you still running

1 it?

2 A No. We ran it for a very limited run. It was not  
3 successful.

4 Q And why do you think it wasn't successful?

5 A Because we don't really appeal to the same customers as  
6 TurboTax.

7 Q Let's just go back to some basics here, sir. You mentioned  
8 a few things about your background.

9 And when you were at Parsons, were you just working on tax  
10 software?

11 A Initially, but by the end of my career at the end of the  
12 seven years, I was working on all of the financial and  
13 productivity titles. I was vice president of software  
14 development.

15 Q And when you ramped up the tax software there at Parsons,  
16 can you just give us a brief overview of how long it took you to  
17 ramp that up.

18 A At Parsons, it was very quick. Parsons also had a software  
19 infrastructure and already had a client base as well as a  
20 reputation. So we were able to hit the ground running. We had  
21 a very competitive product year one, and we were very  
22 competitive in the market year one.

23 And Bob -- Mr. Parsons, obviously, had capital already for  
24 advertising budgets.

25 Q And when you started over at 2nd Story -- and it may seem

1 obvious -- but why did you call it "2nd Story"?

2 A It was called "2nd Story" because it was a play on words.  
3 That was our second time around in the tax software business, as  
4 well as we were on the walk-up second floor of a low-rent office  
5 condominium.

6 Q And back when Parsons and the tax software went to Intuit,  
7 do you know whether Intuit let anybody else use that software?

8 A As part of that transaction, yes, we had to create a version  
9 of TaxACT for Novell which had recently purchased Corel, I  
10 believe, at that time. And as part of that transaction, we had  
11 to create another version of Personal Tax Edge for them to  
12 distribute and give them source code, teach them how to use it,  
13 et cetera.

14 Q And when you went to 2nd Story -- and when did that begin?  
15 What year?

16 A 2nd Story began in 1998.

17 Q And what did you have in terms of assets in order to start  
18 that business?

19 A We started 2nd Story Software by contributing \$5,000 each, a  
20 desk, a chair and a computer.

21 Q And in your view, how long did it take you to become a  
22 significant player in the tax software end of the business?

23 A Because we were 100 percent self-funded, it really took us  
24 to our third product year. It would have been tax year 2000  
25 before we had a competitive, full-featured product. We had all

1 the products, all the states, in all the platforms, and it was  
2 from that point forward that the company's growth really started  
3 to take off.

4 Q And do you know if the FFA had any effect at all on your  
5 ability to grow?

6 A Absolutely. The FFA was a very economical channel that we  
7 were able to utilize to, you know, get no-cost marketing.

8 Q And have you seen anybody else enter in the FFA in the last  
9 few years?

10 A Yes. You know, over the last few years a lot of players  
11 have come online in the FFA, including just in the last month  
12 with 1040.com.

13 Q And 1040.com?

14 A Yes.

15 Q And who are they, sir?

16 A 1040.com, I believe, is registered by Drake Software. Not  
17 exactly sure what the affiliation is, but Drake is an  
18 established provider of tax -- professional tax preparation  
19 software and had been in that business for a long time.

20 Q And do you have any view of the market in which TaxACT  
21 actually competes?

22 A Yes. Just like our marketing message says, we are free for  
23 everyone. We compete for everyone. There is 140 million  
24 taxpayers in a given year, and a lot of those people are  
25 reconsidering each year how they prepared their return the year

1 before. And we want to get our name, our product, our offer in  
2 front of as many of those as possible.

3 Q And does that include the people who are doing assisted  
4 preparation?

5 A Absolutely. We look for people that are -- we try to get  
6 our name in front of people that use assisted, did pen and  
7 paper. All preparation -- tax preparation solutions.

8 Q Now, as we went through a number of documents yesterday --  
9 and we'll go through them in more detail here -- but did you  
10 ever tell anybody on the outside that you were looking at the  
11 market as the entire tax preparation market?

12 A Yes. I believe that in pretty much every offering  
13 memorandum and management presentation, it always starts with,  
14 you know, we're looking at everyone. There's 135, 140 million  
15 taxpayers. And our offer, our product, appeals and is capable  
16 of handling anyone's return.

17 Q And the documents yesterday, when you used the phrase  
18 "entire industry," what are you referring to?

19 A Tax preparation across the board. Every possible  
20 solution.

21 Q Now, you gave a lot of description from counsel's questions  
22 about this distinction that you have between value and  
23 premium?

24 A Yes.

25 Q Can you just tell the Court briefly -- I know you're in

1 sales and you like to talk more than I do, but we need to kind  
2 of keep things limited here, but give the Court an overview of  
3 why it is you think there's that distinction.

4 A That distinction exists because there are customers that are  
5 value conscious and price conscious. They are looking at their  
6 preparation solution options from the year before and  
7 reconsidering what they want to do.

8 And you know, in comparison to other DIY software solutions  
9 we're the low-priced leader, but we're also the low priced  
10 leader, the value leader, across the industry. If you need to  
11 prepare and E-file your federal return and state return, we're  
12 one of the best, lowest priced, highest value solutions out  
13 there.

14 Q Why not just raise the price and go head to head against  
15 Block or Intuit?

16 A That would break our entire model. As I mentioned  
17 yesterday, you know, the word-of-mouth advertising is what  
18 drives the success in the value model. We have to provide  
19 value -- not only the perception of value, but value in fact.  
20 The customer has to believe that they got the best value in  
21 order for them to make a recommendation to their friends,  
22 neighbors and coworkers, which is where we get most of our new  
23 customers.

24 And so to raise the price would break that trust, would  
25 break that chain and the whole thing falls apart. It's like a



1 double drowning. You raise the price, you lose the customer you  
2 already have, and you don't get the referral that they would  
3 have given you or could have given you down the road.

4 Q And how much have you raised the price on your federal  
5 product?

6 A We've never raised the price on our standard product. It's  
7 always been 9.95.

8 Q And do you know where your competitors in that value end of  
9 the market are pricing at?

10 A Very similar. You have a number of different pricing  
11 models, specifically with TaxSlayer and Free Tax USA, but  
12 they're in that same ballpark, especially when you look at the  
13 fed state combination.

14 In this model, you make a lot of your revenue off the state  
15 sale, and it is the combination of federal and state return that  
16 is the driving revenue factor. And we're all clumped in there  
17 at around \$17 to get your federal and state -- that is, the  
18 value players are lumped in there at \$17. That's the price you  
19 need to be to be successful in value.

20 THE COURT: Mr. Dunn, you used the term "model." And I  
21 think you're using -- your describing the value proposition as a  
22 business model; am I correct?

23 THE WITNESS: Yes.

24 THE COURT: But isn't it, in essence, just a marketing  
25 strategy that rather than spending the amount of money that

1 Intuit and H&R Block supposedly spend on marketing, you don't  
2 spend that amount on marketing, but instead rely on word of  
3 mouth?

4 So when you use the term "business model," aren't you  
5 just talking about a different marketing strategy?

6 THE WITNESS: The word of mouth is a key element to it.  
7 And so to do that, you have to provide a high-quality, usable  
8 federal program. You have to overdeliver. When you advertise  
9 free and then you disappoint someone, they're not going to give  
10 you the word of mouth. If you advertise free and they come to  
11 your Web site and, in fact, they can't use a free product  
12 because your free is not as free as it's claimed, you know, a  
13 bate-and-switch-type offer, you've created disappointment.

14 We have to provide -- we have to overdeliver. We have  
15 to overcome that stigma of a free product.

16 THE COURT: Which means -- and correct me if I'm  
17 wrong -- that you're offering in your free product more features  
18 than the other players offer in their free products, but then  
19 they instead rely on larger marketing budgets to attract  
20 consumers to be educated about those features and to buy those  
21 features.

22 So it really still just boils down -- how does it not  
23 just boil down to not a different business model, but a business  
24 model that is, in essence, a different marketing strategy?

25 THE WITNESS: Yes. It is a different marketing

1 strategy.

2 THE COURT: Okay.

3 THE WITNESS: To drive word of mouth.

4 BY MR. ROBERTSON:

5 Q And sir, in fact, the Court just mentioned it, the  
6 difference in features.

7 A Yes.

8 Q Yesterday on the transcript at page 74 in the afternoon,  
9 counsel was showing you TX 6 and was asking you what  
10 distinguishing things there were. And you mentioned features  
11 and quality.

12 Did you notice that he didn't write the word "features" on  
13 his chart?

14 A Yes.

15 Q And what did you mean by features as a distinction?

16 A The premium players do include some features that we do not.  
17 The breadth of their import capabilities, you know, in terms of  
18 W-2, 1099 imports. They also tend to provide more sophisticated  
19 tax advice, help, certainly in the case of Block and more  
20 sophisticated back-end support in terms of audit support.

21 And probably most importantly, because they have the strong  
22 brands, they have the credibility that the customer believes  
23 that those back-end support and the continued support is going  
24 to be there. So those are the types of features that separate  
25 premium from value.

1 Q Now, we've seen some documents already in the case where you  
2 or your staff will mention H&R Block online as a product.

3 You've seen some of those here yesterday, sir?

4 A Yes.

5 Q And how close do you regard H&R Block's online product as a  
6 substitute to your product?

7 A We don't. I mean, we service completely different types of  
8 customers. And you know, I believe our surveys back up that  
9 conclusion.

10 MR. ROBERTSON: May I have a moment, your Honor?

11 THE COURT: Yes.

12 (Brief pause.)

13 MR. ROBERTSON: Your Honor, may I approach the witness?

14 THE COURT: Yes.

15 MR. ROUSH: May I approach the Court with copies?

16 THE COURT: Yes. Thank you, Mr. Roush.

17 MR. ROBERTSON: All right. Your Honor, if I could  
18 continue.

19 THE COURT: Yes, please proceed.

20 BY MR. ROBERTSON:

21 Q Sir, turn to your Tab No. 1. And there should be DX 378 in  
22 there.

23 Do you see that, sir?

24 A Yes.

25 Q And what is this, sir?

1 A This is a summary results for an exit survey that is offered  
2 to all TaxACT customers that actually complete the filing of  
3 their return.

4 Q And do you know whether 2nd Story conducts a survey in the  
5 ordinary course of business?

6 A Yes. This has been offered -- the exit survey has been in  
7 the online product for a number of years.

8 Q And for example, we can with start any year, but just pick  
9 page 4, please, 2008. We could do any year you'd like.

10 But in 2004, can you tell us what these numbers told you, if  
11 anything?

12 A Yes. This basically shows of the customers that finished  
13 their return and opted to complete the survey, that, you know,  
14 9.7 percent of them said that they used TurboTax the year  
15 before. Only 2 1/2 percent said they used TaxCut, which at that  
16 time was the name of the Block product the year before.  
17 12 1/2 percent had used a tax professional the year before. And  
18 4.8 or 5 percent had prepared their return manually.

19 Q And if we can go to page 6, which is the 2009 online  
20 feedback. And you called this an exit survey.

21 Is that people who were leaving?

22 A Yes. This is people that have completed their returns.

23 Q Complete the returns?

24 A Yeah.

25 Q And what, if anything, do these numbers tell you, sir?

1 A Looks like we changed the survey. It is a little bit more  
2 detailed breakdown. 5.7 percent prepared themselves. 3.6 used  
3 an accountant. 9.1 used a tax preparation service. 2.8 used a  
4 spouse, friend or relative. Fairly significant number there  
5 that used, in essence, assisted preparation. TurboTax was 8.7.

6 And again TaxCut, which at that time was the name of Block  
7 At Home, was 2.2 percent. And 1.8, this was their first time.

8 Q And except for the "none" or "none, this is my first time,"  
9 is there any other category of method of doing their taxes that  
10 is as low as TaxCut?

11 A No. It has the -- you know, "none" and "my first time" are  
12 the only two that are lower than TaxCut.

13 Q Now, when you saw these numbers each year -- let me ask you  
14 this: Did you see these numbers each year?

15 A Yes. This is a report that we actually see on a weekly  
16 basis.

17 Q And when you saw these numbers, were you surprised at all at  
18 the low numbers that were switching from H&R Block At Home?

19 A No.

20 Q Why not?

21 A Again, it's our belief that we don't compete closely with  
22 Block or TurboTax, the other premium products. That we get more  
23 customers from other sources than other DIY software.

24 Q And does that affect at all your way that you market the  
25 product?

1 A Yes. I mean, we cast as broad a net as possible, as I've  
2 said numerous times. You know, we really look at 140 million  
3 taxpayers as our potential customer base. We don't know where  
4 the value customer is or what they used last year, but we want  
5 to get our name, our product and our offer in front of as many  
6 people as possible so that for those customers, for those  
7 taxpayers looking at considering their alternatives, that they  
8 consider ours.

9 Q And turn to Tab No. 2, sir, DX 2200.

10 A Yes.

11 Q And if you can tell the Court, please, what this is, sir.

12 A This is a survey of taxpayers that completed a free online  
13 return in 2006, but then did not come back and utilize our  
14 services in 2007.

15 Q And for example, if you'd turn --

16 MR. WAYLAND: Your Honor, before this inquiry, could I  
17 ask that Mr. Robertson lay a foundation about this witness'  
18 knowledge.

19 MR. ROBERTSON: I'm doing that. That's a fair  
20 objection.

21 THE COURT: I look forward to it.

22 MR. ROBERTSON: Thank goodness I had it on my outline.

23 BY MR. ROBERTSON:

24 Q Sir, you've identified what this survey is. Do you know  
25 whether it was prepared in the ordinary course of 2nd Story's

1 business?

2 A Yes.

3 Q And do you get to see these documents each year, sir?

4 A Yes.

5 Q And do you rely on them, if at all?

6 A They confirm what we already believe to be true about the  
7 market.

8 Q And if you could then take us to Page No. 7. And just tell  
9 the Court what this particular component of the survey is, sir.

10 A Page No. 7 is people that completed an online Deluxe return  
11 in 2005, but did not return to complete their 2006 return.

12 Q And what is your Deluxe product?

13 A The Deluxe is our paid federal program.

14 Q Except for the free product, is there anything lower priced  
15 than Deluxe?

16 A No.

17 Q And except for the Deluxe product, is there any Super Deluxe  
18 for consumers?

19 A Not at TaxACT, no. This is our only paid product.

20 Q This is the paid product?

21 A This is our paid federal program, yes.

22 Q All right. And looking at the results on here, do you know  
23 what the largest number of people were that -- where people went  
24 to as an alternative?

25 A They went to some version of assisted preparation. The



1 combination of personal, accountant or CPA, and walk-in tax  
2 office represents 43 percent.

3 Q And as you saw these numbers each year, does that surprise  
4 you at all?

5 A No, it does not. When taxpayers lose confidence in doing  
6 the return themselves, they may step out of the do-it-yourself  
7 solution, go to assisted prep, but it's my belief that at some  
8 point -- a year or two down the road -- they'll come back.

9 Q And do you try to get them back?

10 A Absolutely.

11 We have reactivation campaigns as well as, you know,  
12 general broadcast advertising.

13 Q And you have prepared by hand. What is that, sir?

14 A That is the number of people that left our federal solution  
15 and then the next year prepared their tax return by hand doing  
16 it manually, paper and pencil.

17 Q And I see you have TaxCut software up there. Do you know  
18 what that one is?

19 A Yes. The Block and Intuit products here are split out  
20 between their desktop and their online version so TaxCut  
21 software would be someone that's switched to a PC-based  
22 application and used the Block software.

23 Q And then we have TaxCut Online.

24 What's that, sir?

25 A That would be the online version of the Block program.

1 Q And compared to either prepared by hand or by going into a  
2 tax store -- I think you gave this a number 43 percent people go  
3 to, 8 percent prepared by hand -- where does TaxCut's software  
4 or online digital product fit in that mix?

5 A Very few. Very few people leave us to go to the Block  
6 products. I think you have 3 -- 5 percent.

7 Q Do you have any explanation why you're not getting as many  
8 people from H&R Block's product to either come to TaxACT or go  
9 there when they leave you?

10 A Yeah, I don't believe that our customers -- the value  
11 customers -- believe that, you know, Block is a substitute, a  
12 competitor. They are looking at other solutions. Our value  
13 customers don't associate with that brand.

14 THE COURT: Could I just interrupt you for a second.  
15 You had mentioned earlier this morning about the importing of  
16 data being one of the features that tax filers may look for  
17 going from one year to another.

18 THE WITNESS: Yes.

19 THE COURT: Does the TaxACT product -- free product --  
20 allow for the import of data from one year to another so a tax  
21 filer can avoid manual input of the data each year?

22 THE WITNESS: No. To import your TaxACT data from year  
23 one to year two, you would have to use our paid Deluxe  
24 program.

25 THE COURT: Okay.

1 BY MR. ROBERTSON:

2 Q And if you'd turn to Tab 3, sir.

3 A Yes.

4 Q And DX 364.

5 MR. WAYLAND: Your Honor, I'd like to voir dire the  
6 witness on this document before he asks any questions. I'd like  
7 to voir dire the witness on this document before any questions  
8 are asked.

9 THE COURT: Okay. Let me just see what this  
10 document is.

11 MR. ROBERTSON: This is a spring 2011 survey, your  
12 Honor.

13 THE COURT: The 2011 survey.

14 MR. ROBERTSON: I think we've seen this one before.

15 THE COURT: Yes. Don't you want to wait until you see  
16 whether the foundation established by Mr. Robertson is  
17 sufficient?

18 MR. ROBERTSON: Kind of depends on what I'm using it  
19 for.

20 THE COURT: Right. So please proceed, Mr. Robertson.

21 BY MR. ROBERTSON:

22 Q Now, sir, I'm going to tell you what I'm not asking you  
23 about. I'm not asking you about whether you were involved in  
24 doing this survey.

25 A Yeah, I was not involved in doing this survey.

1 Q Okay. Have you seen the survey?

2 A Yes.

3 Q And my only question is whether the results of the survey  
4 comport with what you've seen in your experience in your surveys  
5 over the past eight years?

6 MR. WAYLAND: Objection, your Honor. Two bases:  
7 Foundation and seeks an opinion which he has not been qualified  
8 to do.

9 THE COURT: Overruled.

10 BY THE WITNESS:

11 A Yes. The results of this survey were generally consistent  
12 with the surveys that we've had in the past.

13 Q You mentioned yesterday, sir, and I think again this  
14 morning, that there's some kind of management presentation that  
15 goes along with this -- the banking or offering memoranda?

16 A Yes. The normal sequence of events in this type of process  
17 is you mail out these offering memorandums in bulk. You get  
18 some letter of interest or inquiry from the private equity  
19 firms.

20 And those that are deemed worthy by our investors and the  
21 investment bank are then invited to a person-to-person,  
22 face-to-face meeting where they get to ask questions and  
23 management makes a presentation.

24 Q And how many of these presentations, approximately, have you  
25 personally made?

1 A I would say over the last seven years, probably 50.

2 Q And if we could turn, please, sir, to DX 558 in Tab 4. This  
3 was a document that counsel showed you a couple pages out of --  
4 I think one page -- yesterday. I'm using our version DX 5058  
5 because I don't have counsel's version that I can put on the  
6 screen.

7 Could you please tell the Court what this is, sir.

8 A This would have been the PowerPoint presentation that  
9 accompanied the management presentation for the last process  
10 that was completed in -- that we conducted in 2010.

11 Q And in terms of the overall organization of this, how does  
12 this compare to the other 49 or so that you've done?

13 A Very consistent.

14 Q And turn to page DX 5058 at page 7, please. And can you  
15 tell us please, sir, what's depicted here, if you know.

16 A Again, it shows the total market and how it's split with --  
17 at this time and how we have product offerings that appeal to  
18 all of that.

19 Q And if you'd turn to page 9 of the slides, which is actually  
20 DX 5058-10. You begin a section called "The Market  
21 Opportunity"?

22 A Yes.

23 Q And when you gave these presentations, did you tell people  
24 about the market opportunity?

25 A Yes, absolutely. And again, we present the market as

1 140 million taxpayers and how our product appeals to the value  
2 segment that's in those 140 million, but that we have to put our  
3 message in front of all of them. And that regardless of what  
4 they used in the past, they are a potential candidate to use us  
5 in the future.

6 Q And if you'd look at DX 5058-11, which is the following  
7 page, what is this slide, sir? Is this still within the section  
8 called "The Market Opportunity"?

9 A Yes. This shows the growth of the number of U.S. individual  
10 income tax returns filed over time. It shows the percentage  
11 growth as well as the growth in absolute numbers. Also shows,  
12 again, the current breakdown, but it, you know, talks about the  
13 transition from paper and pencil and professional into DIY.

14 Q And I notice there are footnotes at the bottom where it has  
15 a bunch of IRS this and IRS that.

16 Do you know what that is, sir?

17 A It's citing the source for the information, and this is all  
18 based off of information that's released by the IRS.

19 Q And what does this graph on the left-hand side say, if  
20 anything?

21 A That, you know, the market is growing and consistently  
22 growing in terms of absolute numbers.

23 Q And to reach all these people in this entire market, what do  
24 you do in the way of marketing to try to reach those people, if  
25 anything?

1 A We advertise in the broadest vehicles available: On TV,  
2 banners on the Internet, home pages of sites like Yahoo, MSN,  
3 and try and get our name in front of as many people as  
4 possible.

5 Q After hearing the questioning from counsel yesterday, did  
6 you think to yourself, "Golly, gee, we should be ignoring all  
7 the assisted prep and pen-and-paper customers"?

8 A No. You know, there's certainly -- as the Internet has  
9 become the consumers' tool of choice for convenience, it has led  
10 a lot of people to reconsider their tax preparation solutions  
11 and, you know, the transition that is happening in the tax prep  
12 market is not too dissimilar from that that has happened in  
13 other markets like cars, insurance, airline tickets, travel  
14 agencies, et cetera.

15 As people become more comfortable and more familiar with  
16 utilizing the Internet to conduct business, they like the  
17 convenience and they are making that transition in tax prep as  
18 well.

19 Q You mentioned to counsel yesterday that some people will  
20 switch to assisted because of a life change?

21 A A loss of confidence. And this is a problem that's, you  
22 know, I guess plagued the DIY software business really going  
23 back to Parsons. Something happens that causes the taxpayer to  
24 lose confidence. It may be a life event. It may be that they  
25 inherited money, for example, and are unsure about how that

1 might impact their tax return. In fact, it doesn't, but that  
2 doesn't mean that they feel comfortable about making that  
3 determination.

4 Likewise, it could be something as routine as getting one of  
5 the millions of IRS computer-generated letters. You know, if  
6 you close a bank account and move and forget to tell the bank  
7 where you moved to, you don't get the 1099. The IRS gets the  
8 1099, and 18 months later you get a letter that says, "Gee, you  
9 forgot to report \$150 in interest. We'd like \$65 in penalty and  
10 interest, please."

11 That rattles a lot of people and could cause them to  
12 reconsider their decision to DIY and might go to assisted again.

13 Q And you said earlier that you see those people often come  
14 back?

15 A Yes.

16 Q Any explanation for that?

17 A You know, they, A, regain their confidence; B, they get  
18 tired of paying someone to sit on the other side of a computer  
19 that's asking them the same questions that they could answer at  
20 home.

21 Q And we just saw a percentage of people that shift from your  
22 product back to pen and paper. Any explanation for that?

23 A Yes. Again, with our customer base, the value conscious,  
24 cost-conscious customer, they are looking at the next lowest  
25 priced solution, which is pen and paper. And again, throughout



1 my 20 years in DIY software, pen and paper, especially for state  
2 returns, is our biggest threat.

3 And if you look -- you know, of our federal E-filers, we can  
4 only get about half of them to finish their state return using  
5 our product. The other half, if they've used us for their  
6 federal return, half of them use us for their state return. The  
7 other half are going out and filling that return in either by --  
8 filling it by hand and either mailing a paper return in or using  
9 one of the online fill-in forms options that a lot of the states  
10 provide.

11 THE COURT: And to use you for the state, they have to  
12 pay for the Deluxe version?

13 THE WITNESS: No. They have to pay us for the state.  
14 You can use our free federal addition for free, and then you  
15 would have to pay us 14.95 to file the state.

16 THE COURT: Okay. It means I wasn't paying as close  
17 attention to the ads I've seen here.

18 THE WITNESS: The ultimate bundle would be 17.95 just  
19 if you want to do both, Deluxe and state. We only charge \$3  
20 more over what the state price alone would be. So consequently,  
21 a lot of people that buy our state would go ahead and buy the  
22 ultimate bundle.

23 BY MR. ROBERTSON:

24 Q Sir, do you observe in the marketplace Intuit out there  
25 competing in marketing?

1 A Absolutely. They're out there everywhere.

2 Q And in your observation, do you see them just marketing  
3 towards people who want to use online software?

4 A No. They are out there advertising for everyone and, in  
5 fact, you know, in this last tax season, they were aggressively  
6 going after assisted prep.

7 Q Now, you mentioned to counsel that you looked at TaxSlayer  
8 and Free Tax USA, one of the products by TaxHawk, as other value  
9 players.

10 Do you see them out there in the marketplace marketing?

11 A Yes, absolutely. TaxSlayer especially is very creative in  
12 their marketing campaigns. I believe that they have -- I know  
13 that they have sponsored NASCAR numerous times. I think they  
14 still do. I believe that they're sponsoring a football ball  
15 game this year.

16 And we also bump up against them and Free Tax USA in search.  
17 You know, search is an open-bid system. And the most, best  
18 producing terms are the generic ones: "Free tax return," "free  
19 E-filing," "E-filed return." And it's an open bid. It's just  
20 like eBay: You bid, your name gets put up so it's something you  
21 have to monitor constantly.

22 And so, yes, we do get outbid by Free Tax USA, TaxSlayer.  
23 All of these companies are out there aggressively competing for  
24 those high-producing search terms.

25 Q And do any of your documents, including those counsel showed

1 you yesterday, make this value premium distinction we were  
2 talking about?

3 A We probably didn't make the premium distinction, but we  
4 certainly talk about being the value leader a lot, both in  
5 marketing materials as well as management presentation and in  
6 offering memorandum. The value premium construct is probably  
7 something unique to hear, but we did talk about we're value,  
8 they're not.

9 Q And when you call yourself No. 1, what do you mean by  
10 that?

11 A That we are the leader in value. That, you know, obviously,  
12 you know, Intuit's the biggest DIY software provider by far, but  
13 we are the leader in value.

14 Q Let me just turn to Tab 5 and looking at DX 12. Hopefully  
15 it will appear.

16 At the very top of the screen, do you know what DX 12 is,  
17 sir?

18 A Yes. This would be a press release.

19 Q And do you have any role in deciding to call yourself  
20 "America's #1 value leader in tax preparation software  
21 products"?

22 A Yes. I know that we would have discussed this amongst the  
23 four of us.

24 Q And if you were referring to just an online software market,  
25 would it be accurate to describe you as No. 1?

1 A Yes. We are the No. 1 provider of value software.

2 Q Are you the No. 1 in an online software market that counsel  
3 was describing yesterday?

4 A No.

5 Q Who would that be, if you know?

6 A Intuit.

7 Q And how big is Intuit, to your knowledge, compared to you?

8 A In terms of units, I believe they are probably seven to  
9 eight times larger than we are. But in terms of revenue, as I  
10 mentioned yesterday, they made \$1.3 billion on consumer tax last  
11 year. We made 70 million. That makes them like 20 times larger  
12 than we are.

13 Q And this same document, sir, do you see where it says, "It's  
14 thrilling to know that it is customer input and loyalty that has  
15 helped position TaxACT's brand name so that it is, in every  
16 aspect, synonymous with value"?

17 A Yes.

18 Q We're going to get it up here on the screen. And what did  
19 you mean by that, sir?

20 A That we, from the onset, you know, wanted to build a brand  
21 that would be equated with value. And so we have done  
22 everything across time to support that proposition. And, yes,  
23 we want to be the value leader in software.

24 Q Now, this says this is something from you. Did you  
25 authorize this statement to be put out there in the public?

1 A Yes.

2 Q And do you feel the same way today?

3 A Yes, I do. We still want to be the value leader of the  
4 American taxpayers.

5 Q And you also at the time had different ways you could enter  
6 the information in the TaxACT product.

7 Do you remember that, sir?

8 A Yes, and we still do. You can enter your information via a  
9 question-and-answer format, but you can also enter your  
10 information directly on a tax form for those taxpayers  
11 especially that have prepared manually in the past and are more  
12 comfortable and more familiar with the tax forms. They want to  
13 utilize that format. And we still provide that format today.

14 Q Do people use that?

15 A Yes, absolutely.

16 Q And how is that different than the IRS fillable forms?

17 A The primary difference between the fillable forms is that  
18 ours calculates more information than the fillable forms. The  
19 fillable forms that the IRS provides today will add up on that  
20 form, but it won't transfer information between forms.

21 So if you have itemized deductions on Schedule A, Schedule A  
22 will add up the itemized deductions. You have to read that  
23 number, then go to the 1040 and enter your total itemized  
24 deductions.

25 Q Now, let's turn to Tab No. 6, please. And this was

1 Government Exhibit No. 28-26 that you were shown yesterday.

2 A Yes.

3 Q Counsel was pointing you to --

4 A I don't think they showed it to me, but they did ask me if I  
5 had ever referred to the company as being a maverick, which this  
6 was the document that I referred to us as a maverick.

7 Q All right, sir. And when you say that word, you say, "This  
8 is possible because a tax industry maverick" -- what did you  
9 mean by "tax industry"?

10 A That, you know, our offer was unique across the whole tax  
11 preparation industry. And our, you know, offer was being  
12 presented to everyone regardless of their preparation solutions  
13 in the past.

14 Q And just curious why you didn't put TurboTax and H&R Block  
15 At Home anywhere on this press release?

16 A It wasn't, you know, important to us. You know, we wanted  
17 to get the word out that we were a maverick across all  
18 preparation solutions. Our offer was unique. This was the only  
19 free offer at that time in any preparation solution.

20 Q And this was back -- just to firm up the date, can you tell  
21 us when this was?

22 A This was for tax season 2005. So it was in February 2006.

23 Q And you list under "A Number of Good Reasons Exists for  
24 Filing Your Taxes Online," and you list a bunch of reasons down  
25 here. And you say -- let me make it clear.

1 Did you have a role in writing this?

2 A Yes, I did.

3 Q And No. 1 where you say, "It's faster," faster than what?

4 A It's faster than manual preparation. So yes, easy to  
5 understand, Q&A, plain English.

6 Q And what do you say in the first sentence of paragraph 2?

7 A That it's easier than preparing your taxes by hand.

8 Q Is that what we've been calling paper and pencil or pen and  
9 paper?

10 A Yes.

11 Q Why are you marketing to people who are preparing their  
12 taxes by hand?

13 A Because that is, you know, one of the sources for customers  
14 to come to TaxACT. And again, we're looking for taxpayers that  
15 are value conscious, cost conscious, so we understand that those  
16 are the most likely still to be using paper and pencil.

17 Q And No. 3, you say, "You'll make fewer mistakes."

18 Fewer mistakes than what?

19 A Than paper and pencil, than computing them by hand, yes.

20 Q And No. 4, you say, "It's less costly." And can you read  
21 the next sentence.

22 A "Filing returns online is less expensive than using an  
23 accountant."

24 Q Why were you marketing to people who were thinking about  
25 using a tax store?

1 A Again, of the 140 million taxpayers that are out there, at  
2 any one point in time there is a large chunk of those  
3 reconsidering their preparation solutions. And we want them to  
4 go about our option.

5 Q And then the next one, "Faster refunds." Talking about  
6 mailing the return in.

7 What kind of customer, if any, were you trying to target  
8 there?

9 A All. Anyone that, you know, would want to E-file their  
10 return.

11 Q Let's turn to Tab No. 7, sir, and DX No. 13. And if you can  
12 tell us, please, what DX No. 13 is.

13 A It is the minutes of a meeting called "The Strategy Meeting"  
14 on September 9th, 2008.

15 Q And it has listed on the top the people who were there.

16 Do you know who these folks are?

17 A Yes. In addition to myself, those are the middle  
18 management/senior management staff at 2nd Story.

19 Q And what was the issue that you were talking about in here  
20 under the second bullet point under "Marketing"?

21 A They were discussing and considering, you know, whether now  
22 is an opportune time for a state price increase. You know, one  
23 of the purposes of this meeting is to get our middle management  
24 staff to think more about the company and less about their  
25 individual departments. So we frequently challenge them with



1 assignments like this.

2 Q And under the state pricing, you're raising the price a  
3 dollar. Can you just read us, please, what the con for that is.

4 A The con would be that it may drive customers to complete  
5 manually. As I mentioned earlier, we already have a difficult  
6 time convincing our customers to utilize our DIY software at  
7 14.95 to prepare their state return. A lot of them already do  
8 it manually.

9 And to increase the price even a dollar is going to drive  
10 even more of them to do that. And in our belief, the loss in  
11 revenue and word-of-mouth advertising, would more than offset,  
12 you know, what we would gain from the price increase.

13 Q And do you know what decision was made at that time in  
14 September 2008?

15 A There was no price increase.

16 Q Turn to Tab 8, please, sir. We're looking at DX 2002.

17 And please tell us, sir, if you know, what DX 2002 is.

18 A These are -- it's an agenda for a board of directors meeting  
19 on August 13th, 2008.

20 Q And who was on the board of directors at that time, sir?

21 A The board of directors is myself, Todd Crockett from TA and  
22 Kurt Jagers from TA.

23 Q And under Point No. 2, there's "Tax Year 2008 Plans." And  
24 can you read Point A on there.

25 A "Hold off on price increases due to competitive pressure on

1 free."

2 Q And do you know what was meant by that, sir?

3 A Yes. That, I believe, the board had asked us if in a  
4 previous phone call -- that is TA had asked us, you know -- if  
5 we had considered a price increase. And so the discussion here  
6 was why we would not want to do that. And especially with our  
7 federal program, there is a lot of competition with free not  
8 only between other free alternatives, such as TaxSlayer and Free  
9 Tax USA, but also with our own free.

10 You know, to increase the price from 9.95 to 10.95 or 11.95,  
11 we're going to get that many fewer people to upgrade. And we  
12 did not feel that it would be a good decision at all, which is  
13 why we've never raised it.

14 Q So is it fair to say at that time you didn't raise the  
15 price?

16 A No.

17 Q And of the board members who were there, do you know who it  
18 was who was advocating not raising the price because of these  
19 pressures from free?

20 A Me.

21 Q Do you still believe that today, sir?

22 A Yes, absolutely. There's even more free today than there  
23 was then. Like, assisted preparers are now going free.

24 Q After this transaction goes through, do you know who is  
25 going to run the TaxACT software products?

1 A Me.

2 Q And do you have any plans to raise prices?

3 A No, we don't.

4 Q As you sit here today, do you think it would be a great idea  
5 to raise prices?

6 A No. The reasons to or not to raise prices after this  
7 transaction are exactly the same as they are today: The value  
8 model doesn't allow for a significant price increase, even a  
9 dollar. We will break the chain reaction that drives the TaxACT  
10 engine. It simply does not make sense, does not work and it  
11 would be a bad idea.

12 Q Now, we're going to just switch binders for a few moments,  
13 sir, to the big, heavy binder that was, I think, next to your  
14 chair.

15 A I set it on the floor.

16 THE COURT: Are you referring to the government's Lance  
17 Dunn documents binder?

18 MR. ROBERTSON: Yes, your Honor. I'm just going  
19 through some of the documents that counsel used yesterday and  
20 this morning.

21 BY MR. ROBERTSON:

22 Q If anything, sir, I think we've helped the binder business  
23 in this case.

24 Now, if you'd turn to Tab No. 3. And this is of GX 28-10.  
25 And just turning to what is Page No. 18 on the document, which

1 is seven pages in, where it says "TaxACT" -- pardon me. Nine  
2 pages in where it says "Final ACT." I think counsel was  
3 pointing you to the "Note from the President." One more page,  
4 please.

5 "Note from the President," that was you?

6 A Yes.

7 Q And counsel asked you about this note that you made. And  
8 you said, "Since that time" -- do you see the second sentence  
9 from the "Note from the President"? Can you just read that  
10 sentence beginning "Since."

11 A Yes. "Since that time, TaxACT has been a catalyst for  
12 change in the tax preparation industry."

13 Q And what were you talking about, this tax preparation  
14 industry? What is that?

15 A That is all preparation of income taxes regardless of  
16 method. It's also in the last sentence of that note.

17 Q What is that, sir?

18 A "We know that you'll see what we see, the best bargain in  
19 the tax preparation industry."

20 Q And do you think that's true?

21 A Yes, I do.

22 Q And counsel mentioned to you a presentation by the Willkie  
23 Farr firm, which is in their Tab 8.

24 Do you see that, sir?

25 A Yes.

1 Q And the fourth page of that document, which is GX 28-2,  
2 where it has, "The Competitive Landscape."

3 A Yes.

4 Q Do you remember seeing this flashed up on the board when we  
5 were there at the Department of Justice?

6 A Yes.

7 Q And that has -- what types of things are on there, sir?

8 A It has the all taxpayers broken down into three categories:  
9 Assisted, do-it-yourself and friends and family.

10 Q And do you see what the source is?

11 A Yes. H&R Block: TS10 Market Dynamics, Switching Pricing  
12 Competitive Profiles.

13 Q You mentioned to counsel that there were some things in here  
14 you disagreed with. At the time, did you ask the Department of  
15 Justice to get a chance to come in and give your story?

16 A Yes, I believe we did.

17 Q And did you ever get a chance to do that?

18 A Yes, we did. I spent several hours there describing how I  
19 saw the value premium business model and distinction.

20 Q And do you know what the time early on when the Willkie Farr  
21 people were doing this, whether we had -- or they had the data  
22 from all the other players in the industry at that time?

23 A No, I don't know.

24 Q And do you have access to that data like how many sales  
25 TaxSlayer is making?

1 A No, I do not.

2 Q Do you know how much money they're making?

3 A No, I do not.

4 Q What about TaxHawk?

5 A No, I do not have any information about them.

6 Q And when counsel was asking you, well, why don't you just  
7 figure out their market shares in the value segment, do you have  
8 the data to actually do that?

9 A No, I do not.

10 Q Besides the public companies that we know about, do you have  
11 access to the sales information and profitability and things  
12 like that of these other companies that are not public  
13 companies?

14 A No, I do not, which is why we generally -- which is why when  
15 we compute market share, we compute it based on electronic  
16 filing divided -- our electronic filing, divided by total DIY  
17 and total electronic filing in total. Those are two numbers  
18 that the IRS puts out on a regular basis in press releases.

19 Q And in the information you get from the IRS, can you tell  
20 about how many of those folks did it by hand, pen and paper?

21 A They release that information about a year after the fact,  
22 but not on a monthly basis.

23 THE COURT: Is this a good time for a break? Mr. Robertson,  
24 is this a good time for a break?

25 MR. ROBERTSON: Yes, ma'am.

1 THE COURT: Okay. We will take a ten-minute break.

2 (Recess was taken.)

3 THE COURT: Mr. Robertson, whenever you're ready.

4 MR. ROBERTSON: Yes, your Honor. Thank you.

5 BY MR. ROBERTSON:

6 Q Sir, we were about ready to turn to Tab No. 3. And this is  
7 Government Exhibit No. 28-17. Counsel asked you about this.

8 A Okay.

9 Q And you mentioned when counsel was talking to you asking you  
10 questions, about differentiating yourself from what you called  
11 the "premium online products"?

12 A Yes.

13 Q And he was asking you where that was. And I just wanted to  
14 point you to a paragraph and see if you recognize it.

15 Do you remember this particular meeting, this document,  
16 28-17?

17 A Yes.

18 Q And you look down where it has "Thoughts brought up" during  
19 this strategy meeting in January of 2008.

20 A Yes.

21 Q And the paragraph says, "Look at the product. Redefine what  
22 is free. We need to better differentiate our free offer from  
23 TurboTax." And we read the rest of the sentence yesterday, but  
24 feel free to read it.

25 Why were you talking about differentiating yourself from

1 TurboTax?

2 A Because of their free advertising. There was confusion  
3 about who was value, who was premium.

4 Q Why not just offer the same product they have for free?

5 A Again, that would break our value model and our customers  
6 would not, you know, give us that word-of-mouth referral that's  
7 critical to our business. I don't like, you know, what TurboTax  
8 does with free, which is, in essence, say, a  
9 bate-and-switch-type offer.

10 THE COURT: Could you explain that.

11 THE WITNESS: In their advertising, they make very  
12 general claims: Free is better and, you know, free, free, free,  
13 free. It's not -- sorry. There's a very small footnote at the  
14 bottom of their -- for example, their television commercial that  
15 says, "Simple returns only."

16 So then when you come to their Web site and start a  
17 free return, if you have business income, if you sold investment  
18 property such as stocks, bonds, mutual funds, if you have rental  
19 property, if you have a partnership/S corp or any investment  
20 property or ownership, you can't use their free product. If you  
21 pay estimates for the next year, you can't use their free  
22 product to do that. And so it's -- they're holding free out  
23 there, but then they're only delivering it for about half the  
24 taxpayers.

25 THE COURT: But even your product doesn't perform all



1 functions for all taxpayers.

2 THE WITNESS: Yes. Our free program --

3 THE COURT: Do you more expressly detail what you don't  
4 provide in your free product than Intuit does?

5 THE WITNESS: Yes. Our free program does include every  
6 form that you can E-file. Every IRS form that -- there is not a  
7 single taxpayer's return that could be E-filed that we don't  
8 provide support for.

9 Anyone and everyone can utilize the TaxACT free  
10 product. And we hope they do. We don't distinguish based on  
11 characteristics or income types. Everyone can use the TaxACT  
12 free product.

13 BY MR. ROBERTSON:

14 Q When you say "free for everyone," that's what you meant?

15 A Yes.

16 Q And you've been doing that all the way back now for a number  
17 of years.

18 And when you're looking at these premium products, have you  
19 ever thought there was any belief that TurboTax was just going  
20 to become a free for everyone just like you?

21 A We contemplated that they might do that back in 2005,  
22 but no.

23 Q Have you seen it happen any time?

24 A No, they have not. They have not matched that  
25 free-for-everyone offer. They have not matched that capability.

1 Other than Free Tax USA, no one else in the industry has.

2 Q In terms of offering all the forms?

3 A Correct.

4 Q Now, how does TaxSlayer do it? Do you know?

5 A TaxSlayer today uses a slightly different free model. They  
6 have a more selective free. I believe it's for 1040EZ and  
7 active duty military. But they also have a very low-paid  
8 federal and a low-paid state product so that they're still in  
9 there at that \$16 combination price.

10 Q And does anybody offer free state on the online products?

11 A You can get some through the FFA, yes. There is a state  
12 Free-File-Alliance-type movement. So if you prepare your  
13 federal return with select vendors' free file offer, there is  
14 also a corresponding state offer.

15 Q Is that something you're doing?

16 A It is not.

17 Q Turn to Tab 20 of the government exhibit book, please, sir,  
18 Government Exhibit 241. And I want to turn to -- it's page 6 of  
19 the document, which I assume is going to be page 7 of the  
20 slides. This is Government Exhibit 241.

21 Do you see that page, sir?

22 A Yes.

23 Q And when this document is describing the market opportunity,  
24 is it just limited in the way that counsel was suggesting just  
25 to online?

1 A It's talking about E-file growth in general.

2 Q All right, sir.

3 A And it's talking about the growth in online financial  
4 management.

5 Q And growth from where?

6 A From brick-and-mortar-type institutions.

7 Q And if you'd turn to Tab No. 26, which is GX 28-8. This is  
8 the Greene Holcomb, H-o-l-c-o-m-b, document.

9 Do you see that, sir?

10 A Yes.

11 Q And turn to page 11 on the screen, which is page 9.

12 And do you recognize this part, sir?

13 A Yes.

14 Q And the industry that's being described, can you tell us  
15 what the industry is that we're describing?

16 A Tax preparation. That represents 132 million taxpayers.

17 Q And towards the bottom where it talks about people who  
18 decide to self-prepare, do you see that, sir?

19 A Yes.

20 Q And counsel was asking you about whether you included pen  
21 and paper in this. Did you tell people that pen and paper is a  
22 substitute for online do-it-yourself tax preparation?

23 A Yes. It is absolutely an option.

24 Q And if that were -- when it says here that you can go to  
25 libraries, local IRS offices to complete returns with pen and

1 paper, were you talking about there, sir?

2 A Yes. The first sentence in the last paragraph, "Individuals  
3 who choose to self-prepare have several alternatives," and forms  
4 and instructions is definitely the first one listed.

5 Q And on the next page continuing, the "Industry Overview."

6 A Yes.

7 Q Did you miss telling the investors for this Green & Holcomb  
8 report about the other methods of doing taxes besides just doing  
9 it on an online product?

10 A No. Shows the mix of all individual tax filings, you know,  
11 for a couple of different years projected as well as historic.

12 Q And same document turning to page 14 of the document, which  
13 is likely to be 16 on the slide, there's a section that we  
14 skipped over yesterday entitled "Competition."

15 Do you see that, sir?

16 A Yes.

17 Q And can you read the first sentence for the Court so we see  
18 what we're talking about here.

19 A Reading underneath "Competition"?

20 Q Yes. Under "Competition," your first sentence.

21 A "The income tax preparation software and electronic filing  
22 industry is a highly competitive market."

23 Q And who are the competitors that are listed here on the  
24 second sentence?

25 A "The company has numerous competitors that include other

1 income tax software providers, companies providing pure E-file  
2 service, professional tax practitioners who provide these  
3 services directly to individual consumers."

4 Q Had you just skipped over in this document as was suggested  
5 yesterday, assisted preparation as competition?

6 A No.

7 Q In Tab No. 27, which is Government Exhibit 134, which is  
8 "Project Sprout," S-p-r-o-u-t, of June 2007. And this was the  
9 Deutsche Bank Securities one that was put together, right,  
10 sir?

11 A Yes.

12 Q In the page which is No. 1 of the document, which is likely  
13 to be page 3 on the slides, counsel pointed you to a part they  
14 had highlighted under the "Executive Summary." I want to ask  
15 you about the second sentence under the second paragraph after  
16 you mention when you were founded, "2nd Story's unique approach  
17 combines a low-cost pricing model coupled with direct marketing  
18 strategy."

19 Do you see that, sir?

20 A Yes.

21 Q And what is this unique approach that 2nd Story has?

22 A You know, we were the first to prepare -- or to provide free  
23 tax preparation options.

24 Q And why were you trying to tell people that you were  
25 unique?

1 A You know, in this case, to build potential buyer interest  
2 and to show how we are different from the rest of the industry.

3 Q And in the bottom of the page, the part that wasn't blown up  
4 yesterday, there's a paragraph there.

5 Do you see that, sir?

6 A Yes.

7 Q And do you see where it says, "In the U.S., tax preparation  
8 represents a \$19 billion annual market which can be broadly  
9 divided into the self-preparation segment which includes tax  
10 returns prepared using both paper and software-based solutions,  
11 and the paid professional preparation segment"?

12 Do you see that, sir?

13 A Yes.

14 Q Do you know whether you were neglecting to tell people that  
15 you were competing against pen and paper?

16 A No. Clearly, we were listing all of our preparation options  
17 which we compete against.

18 Q Same document turning to page 5 under "Market opportunity."  
19 Underneath "Market opportunity," do you see what kind of market  
20 is being described?

21 A Yes. This would be the U.S. market for all federal income  
22 tax returns.

23 Q Is that what you mean by "tax preparation market"?

24 A Yes.

25 Q And we've got various pie charts here. Do you know what the

1 pie charts -- are they limited just to online software?

2 A No. It shows all preparation methods and gives the  
3 breakdown by units and dollars.

4 Q Turning to Tab No. 32, counsel asked you about an e-mail,  
5 Government Exhibit 28-14, and it had a price on here.

6 Do you see 22.45?

7 A Yes.

8 Q When it says in the sentence right before that, "another  
9 test," do you know what "test" means?

10 A Pricing tests are a fairly common thing that happen  
11 throughout the online business world as a whole. You're looking  
12 at if I lowered my price, what would happen? If I raise my  
13 price, what would happen?

14 And in this case, Intuit was doing some price testing. It  
15 didn't stay that way for very long, apparently.

16 Q And their deluxe on this price test, does that include a  
17 state product too?

18 A I don't believe their deluxe product includes a state, no.

19 Q And after the test, do you know whether they just stayed  
20 down there at that price?

21 A No. I'm sure they did not. Intuit's general pricing  
22 strategy is to continue to increase prices throughout tax  
23 season. So you paid the highest price at the end.

24 Q Counsel pointed you to Tab No. 50, Government Exhibit 105.  
25 And on page 4, which is likely to be slide 5, I think you were

1 asked about the word "pioneer."

2 But do you see the phrase right below "pioneer"? Page 4 of  
3 the slide, which is -- we have it on the screen.

4 A We're the nation's value leader. 2nd Story Software is the  
5 nation's value leader, yes.

6 Q But were you telling people that you were a leader in the  
7 value segment of the market?

8 A Yes.

9 Q Now, just to be clear, sir, your view of the way you market  
10 and who you're marketing against this value-versus-premium  
11 thing, just to be clear, how long have you believed that?

12 A Since the very first day in 1998, that was the mission of  
13 the company from the onset was to be the value leader. And as  
14 one of these press releases said, to build the TaxACT brand to  
15 be synonymous with the word "value."

16 Q Did you get a chance to tell that to the Justice  
17 Department?

18 A Absolutely.

19 Q Now, going back -- and fortunately we'll be getting out of  
20 the big binder for a while, sir.

21 Going back to this whole history of free and where that came  
22 from, and let's go back to the beginning of your experience with  
23 free.

24 A Okay. The first free tax software that I'm familiar with  
25 was in about 1993 when Computer Associates started offering a



1 free product. At that time, it was only distributed via CD.  
2 The Internet wasn't quite as prevalent as it was today and so  
3 they offered a free CD. You just had to pay for the shipping  
4 and handling.

5 Parsons followed suit, and we created a product called "Tax  
6 Mate" and Tax Mate was also free to -- you didn't have to pay  
7 for the CD, but you had to pay 4.95 shipping and handling but  
8 you could download that one for free if you had CompuServe, AOL,  
9 et cetera.

10 Q About when are we talking about?

11 A That was about 1993, I believe. And the Tax Mate program  
12 was even after Computer Associates got out of the tax business,  
13 Parsons continued the Tax Mate program until it was -- until the  
14 tax -- Personal Tax Edge product line was discontinued. So we  
15 continued free throughout the next three years at Parsons.

16 Q And after you stopped working there at Parsons and were out  
17 thinking about the 2nd Story --

18 A Yes.

19 Q -- then did you observe anybody else out there in the  
20 marketplace offering free?

21 A Yes. Intuit at that time was offering free products on the  
22 IRS partners' page. It was really kind of a predecessor to the  
23 Free File Alliance. The IRS had a page on their Web site to  
24 encourage electronic filing and they called it the "E-file  
25 partners' page."

1 Even in '98, Intuit had a free offer really for free  
2 E-filing that emulated the criteria for the earned income tax  
3 credit. So it was targeted at low income. At that time, it was  
4 probably \$25,000 in AGI.

5 Q I think that level's gone up quite a bit since.

6 A Yes. The EIC goal has. But from there, then 2nd Story  
7 introduced free in 1998 with our product. It was free to  
8 prepare and free to print. That was free to download. We also  
9 sold it on CD with a nominal shipping and handling charge.

10 But that was unique in that we implemented what was becoming  
11 a standard on the Internet of a "try before you buy" model. The  
12 prevalent model at that time was obviously CD-based sales. So  
13 at that time, Intuit and Block were selling most of their  
14 products at retail. So the only time you could actually use  
15 a -- or see a tax software program, you had to pay for it first.

16 With TaxACT, we used the "try before you buy" model with our  
17 online distribution so you could download and install that  
18 application without giving us a dime. You could use it to  
19 prepare and print your return without paying us a cent, and then  
20 you only had to pay us something at that time if you chose to  
21 E-file or attach a state.

22 So we were a pioneer in the "try before you buy," and we  
23 were a pioneer in the free to prepare, free to print. We were  
24 making a very broad-based offer at that time with free.

25 Q Now, you said at the time you weren't offering free E-file.

1 Where did that come from?

2 A We didn't offer free E-filing until our product appeared on  
3 the Free File Alliance. You know, we really didn't provide that  
4 until the government basically forced us to.

5 Q And the Free File Alliance, what was your first offer on the  
6 Free File Alliance?

7 A Our very first offer for tax season 2002 was free if you  
8 made more than \$100,000 or if you qualified to file a form  
9 1040EZ.

10 Q And where, generally, were the other folks?

11 A At that time, on day one, when the Free File Alliance  
12 launched, most of them were in the \$30,000, \$32,000 and less. A  
13 lot of them were grouped around that income tax threshold.

14 Q And at some point did you change your offer?

15 A Yes. After the first processing peak -- I talked about the  
16 dual volume or capacity peaks that tax seasons have. After the  
17 first one, we felt that we had excess capacity and we might as  
18 well expand our offer, and so we expanded it to be 50K and  
19 above, as well as maintained the 1040EZ.

20 Q And what year are we in about then?

21 A That still would have been tax year 2002.

22 THE COURT: Mr. Robertson, can I just interrupt for a  
23 second.

24 When you say that your first offer was free if you made  
25 more than \$100,000 or if you qualified to file a form 1040EZ, do

1 you mean that people who earned -- who only earned more than  
2 \$100,000 could take advantage of the free form? Is that what  
3 you're saying? Or do you mean unless you made more than  
4 \$100,000?

5 THE WITNESS: Yes. Our first offer was for people that  
6 made more than 100,000.

7 THE COURT: So people who were -- who made less than  
8 100,000 still had to pay for it?

9 THE WITNESS: They didn't qualify for our offer on the  
10 Free File Alliance page. On the Free File Alliance page, there  
11 was at that time probably 15 different offers. And as Robby was  
12 pointing out, the bulk of them were down at the lower end of the  
13 income spectrum, so there was 15 offers all clumped together  
14 providing free services to people that made less than \$30,000.

15 Our first initial offer that year was for people that  
16 made more than 100,000. We actually had two offers. If you  
17 made more than \$100,000 or the second offer was if you qualified  
18 to file Form 1040EZ.

19 THE COURT: You weren't targeting the low-income filer  
20 at all?

21 THE WITNESS: No, we weren't.

22 THE COURT: I thought I misheard something so thank you  
23 for that clarification.

24 BY MR. ROBERTSON:

25 Q Why were you targeting the upper income when the other folks

1 were targeting the lower income?

2 A We just wanted to differentiate our offer. There was a lot  
3 of companies there. And as I said, it was kind of the Walmart  
4 of tax offers. And this was the first time ever in the industry  
5 that every tax software product had an offer, had a listing on  
6 the same page.

7 So it was very much a head-to-head competition. And we felt  
8 that, you know, once a customer went there, we've obviously  
9 already lost them and, therefore, we needed to stand out because  
10 there was some very strong brands on that page. And if we had  
11 the same offer as everybody else, would they pick a Block  
12 product or would they pick TaxACT?

13 And so we felt that we needed to differentiate and stand  
14 out, and so that's why we decided to make an offer. And going  
15 into that tax season, I had presumed that most companies would  
16 follow the offer that they made on the IRS partners' page the  
17 year before. Intuit and others had made that earned income tax  
18 credit offer there, and I presumed that they would just extend  
19 that to the Free File Alliance since that was kind of a  
20 successor strategy at the IRS.

21 Q And had your product been on the partners' page?

22 A We had been on the partners' page, but we did not offer free  
23 E-filing. We offered free software.

24 Q And did there come a time when you offered what we've now  
25 heard as free for everyone on the FFA?

1 A Yes. So then in the next year, tax year 2003 -- and you  
2 have the option of changing your offer a set number of times on  
3 the Free File Alliance. So we started the 2003 tax season with  
4 the same offer that we ended in 2002. So \$50,000 and above was  
5 who we were providing free services to on the Free File  
6 Alliance.

7 The others were all over the board. Some companies  
8 followed. Some other -- other companies had the same offer we  
9 had the year before, 100k and above, 75 and above. Offers were  
10 all over the board. And when you looked at the offers in  
11 aggregate, there was only \$10,000 that wasn't covered, between  
12 40 and 50.

13 And so we didn't understand, you know, why it wasn't being  
14 covered. And so we decided that we would change our offer to  
15 cover that \$40,000, but in doing so, felt why not go for an  
16 offer that's much simpler to understand. When you come into the  
17 IRS Web site, do you really know if your adjusted gross income  
18 is going to be \$50,000 and above?

19 And so we just decided to say, well, we're going to expand  
20 our offer by 10,000. It's going to provide a hundred percent  
21 coverage. Looking at the aggregate offers, a hundred percent  
22 coverage would be provided, so why not just make the offer  
23 that's simpler to understand, free for everyone.

24 THE COURT: Well, I guess what I'm -- maybe you can  
25 help me reconcile an offer early on on the FFA Web site of free

1 only if you make more than a hundred thousand dollars with your  
2 marketing strategy to go after the value conscious customers.

3 Not that people who make more than a hundred thousand  
4 dollars aren't value conscious, but certainly everybody who  
5 makes less than \$100,000 would also be looking for good value  
6 too, particularly at free.

7 So how do you reconcile that marketing strategy in 2003  
8 and 2004 with only making an offer on the FFA of free federal  
9 tax preparation if you make more than 100,000?

10 THE WITNESS: You're right in that you cannot identify  
11 a value customer by demographics or, you know, what they drive,  
12 what they eat. They are across the spectrum. And if you look  
13 at who files free tax returns using our program, it's everybody.  
14 We have high-income people, we have low-income people. We have  
15 complex returns that include multiple partnerships, S corps,  
16 rental properties and we have people that earn just wages.  
17 Everybody uses the free product.

18 Knowing that, because we've been offering free products  
19 for a number of years before this, the primary thing that we  
20 wanted to do was to distinguish our free offer in that space  
21 where we knew we would have to compete head to head with 15  
22 other companies. Prior to that, you couldn't go to one space  
23 and see every offer and see every company that's in the  
24 industry. You had to do a search. And you would find the ones  
25 that were advertising for that search term.

1           Here was going to be a head-to-head competition, and so  
2 we felt that we needed to differentiate ourselves. And it was a  
3 shot in the dark. We had no idea what people's offers were  
4 going to be. We also had no idea what the demand was going to  
5 be. The IRS had never done this before. We had no idea if ten  
6 people were going to respond or if a million people would  
7 respond. So as we came out -- as we planned what our offer  
8 would be, we hesitantly said \$100,000 and above because we did  
9 not want to make an offer that would overwhelm our capacity.

10           Does that make sense? We intentionally limited it  
11 because we had no idea what the response was going to be. This  
12 was the first time ever that the IRS had put a promotion for DIY  
13 software on their home page. And their home page gets a lot of  
14 traffic. So we really had no idea what the response would be.  
15 So when we made that offer, we were a little bit tentative  
16 because we did not know what the response was going to be.  
17 After the first peak and we understood what the traffic was  
18 going to be and how many people were going to click on that  
19 offer and we understood that by expanding our offer what the  
20 impact would be on the people -- the worst thing you want to do  
21 is make an offer and not be able to fulfill it.

22           We don't want to make an offer and have the capacity,  
23 you know, to process, you know, 20,000 simultaneous customers  
24 and have 40,000 people try and hit your Web page.

25           THE COURT: So if I'm understanding the last part of



1 your answer correctly, you were limiting it to filers with over  
2 \$100,000 because you were somewhat concerned about your ability  
3 to service everybody under \$100,000 if they also went to that  
4 Web site?

5 THE WITNESS: We did not know what the response was  
6 going to be, how many people were going to visit the IRS.gov.  
7 It was completely new.

8 THE COURT: So you were concerned about capacity?

9 THE WITNESS: We were concerned about our capacity.

10 THE COURT: I understand.

11 THE WITNESS: So that's why we made a somewhat  
12 restrictive offer and then why we opened it up to 50k and above.  
13 Again, to provide differentiation from the other offers that  
14 were there. As I said, our assumption was as soon as a customer  
15 went to the Free File Alliance page, they're going to pick one  
16 of those -- 16 companies.

17 THE COURT: I understand. I'm sorry for the  
18 interruption, Mr. Robertson. Thank you.

19 BY MR. ROBERTSON:

20 Q Sir, at the same time, were you selling the product on a  
21 different Web page?

22 A Yes. We continued to promote our free to prepare, free to  
23 print offers for both desktop and online at TaxACT.com. But the  
24 free E-filing was only available on the FFA.

25 Q And how did the \$10,000 and above free E-filing on the FFA

1 work for you?

2 A 100,000 and above. But it worked fairly well. It brought  
3 us some good volume, but not anything outstanding. It wasn't  
4 until we changed the offer to 50k and above that we started to  
5 get some very good Web traffic from the Free File Alliance.

6 Q And how are you doing on your normal Web site in terms of  
7 volume based on what you were doing on the FFA at that time in  
8 2003?

9 A Yes. Actually, that was 2002 that we changed to 50,000.

10 Q Okay.

11 A We were doing good, but the FFA was a primary driver of our  
12 growth that year.

13 Q And then when you finally decided to go ahead and bridge the  
14 gap of, I think you said, 40,000 to \$50,000 AGI.

15 A Yes.

16 Q What percent in terms of total volume, if you know, were you  
17 trying to bridge, that was either available on the FFA and you  
18 were trying to add?

19 A We were just trying to span that last 10,000 of AGI. So it  
20 was a very small percentage of the total population.

21 Q Now, when you refer to yourself as a pioneer in offering  
22 free E-filing, which of these events, if any, are you talking  
23 about?

24 A We speak primarily about 1998 as being the biggest thing  
25 that we did as a pioneer. But we did also reference what we did

1 in 2003 as being the first to provide free E-filing for  
2 everyone.

3 Q Now, in your view of the world, do you look at free as a  
4 separate market segment?

5 A No. Free is an integral part of our brand. It's an  
6 integral part of our marketing strategy. It is part of our  
7 customers.

8 Q And do you see others using free as a marketing strategy?

9 A Yes.

10 Q And you mentioned "try before you buy." Do you see that  
11 elsewhere in the marketplace?

12 A Yes. It certainly existed in other places outside of tax  
13 software when we did it, and now it's relatively prevalent  
14 across the Internet and mobile devices now. You know, it is  
15 pretty much the standard for distributing Apps on iPhones and  
16 Androids and iPads and everything.

17 Q And not to make you sound like Vice President Gore, but did  
18 you invent this free model on the Internet?

19 A The "try before you buy"?

20 Q Yes, sir.

21 A No. Others were doing it at the time in different  
22 categories. And in fact, you know, at Parsons, even in tax, you  
23 know, the Tax Mate, was also utilizing that "try before you buy"  
24 model.

25 Q And let me ask you this: Do you know what Mint is?

1 A Yes. Mint is an anonymous financial planning tool.

2 Q And what is it for?

3 A It is for people to provide all of their financial  
4 information and to get advice about what they could do  
5 differently, but you can do it anonymously so you don't have to  
6 give them your name, you don't have to give them your address.  
7 But you do have to give them your account numbers.

8 Q And do you know what kind of model they have in terms of  
9 marketing?

10 A It's free, yes. It's all free.

11 Q And has 2nd Story ever dabbled with Mint?

12 A Yes. We were in discussions with Mint to work together. We  
13 would have incorporated some tax content into Mint, but it never  
14 came to fruition because they were acquired by Intuit before  
15 anything ever happened.

16 Q And after they were acquired by Intuit, do you still see  
17 them out there with the free model?

18 A Absolutely.

19 Q Have you seen any other products that Intuit has where it  
20 has this "try before you buy" type model?

21 A Yes. Intuit has applied free and "try before you buy" to  
22 pretty much their entire product line: Quicken, QuickBooks. I  
23 don't think they've done it with Quicken Payroll. They may have  
24 actually done, you know, try for 30 days on Quicken Payroll.

25 Q And what, if anything, do you see as the current role of

1 free in the tax preparation market?

2 A You know, free is at this point I would say the industry  
3 standard. The Free File Alliance has created the demand and  
4 created the purpose for free services. And in order to compete  
5 in either value or premium, you have to have free products  
6 because otherwise, people would simply go to the Free File  
7 Alliance.

8 Q And have you seen the assisted prep folks at tax stores just  
9 skip over the model?

10 A No. As I said before, you know, free is affecting the whole  
11 tax preparation industry and so, yes, you now see assisted prep;  
12 H&R Block being the most prevalent announcing that they provided  
13 or would prepare returns for free in their brick-and-mortar  
14 stores.

15 Q Would you ever contemplate now just moving away from the  
16 free model and doing something else?

17 A No. That would be impossible.

18 Q Why?

19 A Well, certainly with TaxACT, that would break the chain  
20 reaction, word-of-mouth advertising chain, but you have to have  
21 a free product that's better than what you have on the Free File  
22 Alliance. Every player does. You can't have your best offer on  
23 someone else's Web site. It needs to be on yours. The  
24 customers need to come to you so that you can build that  
25 relationship.

1       Once they start going to the Free File Alliance, they could  
2 pick anybody's product. So you need to have a free offer on  
3 your page that is better than what you offer on the Free File  
4 Alliance. And that's pretty much what everyone does now.

5       Q   What about Block? Have you seen what they've done?

6       A   Yes. They're aggressively promoting free in software and in  
7 brick-and-mortar assisted prep.

8       Q   Now, after this acquisition goes through, what is your  
9 expectation of what your role, if any, will be?

10      A   I will be leading the Block digital group. That would  
11 include the Block products, as well as the TaxACT product  
12 lines.

13      Q   And what about the Web site? Do you know where that's going  
14 to go?

15      A   HRBlock.com. Yes, we will be managing that. I believe  
16 that's probably in year two, but we will be taking over  
17 providing that service.

18      Q   And in hosting that Web site, do you know today whether it  
19 only has the online products on the H&R Block dot-com Web  
20 site?

21      A   No. It would be the complete corporate Web site for  
22 investor relations, find a preparer, locate an office. All the  
23 information that is on their corporate Web site today plus more  
24 would be hosted and supported, and our marketing group would do  
25 the creative and content creation for that site as well.

1 Q And what's your plan in terms of -- without getting into  
2 prices -- I don't want to do that right now, we'll do that  
3 later -- but just generally in terms of your plans, if any, of  
4 marketing TaxACT and H&R Block At Home?

5 A We would build off of what we're currently -- what each is  
6 currently doing today. So in terms of TaxACT, the free and  
7 Deluxe and state programs would remain at their current prices  
8 and current functionality. As I said before, the rationale to  
9 either increase or decrease prices post-close are the same as  
10 they are today.

11 From the Block standpoint, from a strategy, would be, again,  
12 to continue to position that product as a premium product and to  
13 continue to aggressively use free to attract premium customers  
14 to that brand.

15 Q Now, sir, if we can get some sort of a timeline here.

16 Do you recall there being discussions with Block on a  
17 possible acquisition back in 2009?

18 A Yes, I do.

19 Q And we heard some testimony that at some point that died.  
20 Do you know why?

21 A I don't know what their specific reasons were. I know what  
22 they told us and our investment bankers was that they stopped  
23 that process because they didn't feel that the four founders  
24 were sufficiently interested and motivated in the transaction.

25 Q And as we sit here today, are the four founders interested

1 and motivated to do the transaction?

2 A Absolutely. And we were then too. However, they provided  
3 us absolutely no information about what we were going to do, how  
4 we were going to do it, where we were going to report. The 2009  
5 process was very much a black box for us. They just wanted us  
6 to blindly sign on without knowing what we were going to do or  
7 who we were going to report to.

8 So, yes, we were very skeptical about what we were getting  
9 into and I guess that showed.

10 Q And at some point later did a new process begin?

11 A You know, it was really about three processes in the time  
12 frame of about a little over a year. You know, I talked with  
13 Russ Smyth and his senior management team throughout the 2009  
14 process, which they abandoned in about the October/November time  
15 frame.

16 And then by, I think, mid-February of 2010, again, Russ  
17 Smyth contacted me and said, "Hey, let's start talking again."  
18 And that mini process continued from February until about May or  
19 June. And then he again abruptly said, "No, we can't finish  
20 this. I have issues here I need to deal with." And so it  
21 stopped. It then comes to light a few weeks later that he's  
22 leaving the company, and it starts again a third time with Alan  
23 Bennett on July 19th and 20th.

24 Q And how did that meeting arise? Give us a history of that.

25 A I don't remember exactly the date that Russ Smyth resigned,



1 but the day that it became publicly announced at about 4 o'clock  
2 in the afternoon on that day, Russ Smyth called me and said,  
3 "Hey, Lance, you probably saw the news. I've resigned. But  
4 Alan Bennett is going to be taking over. He is a great guy. He  
5 is here in the office with me. I'd like to introduce you guys,  
6 and we'd like to come to Cedar Rapids to talk to you about, you  
7 know, restarting this process."

8 Q And did he do that?

9 A Yes. Russ and Alan Bennett and several senior management  
10 people from H&R Block came to Cedar Rapids on July 19th and 20th  
11 for what I half jokingly refer to as a job interview for the  
12 four founders.

13 Q And why did you call it a job interview?

14 A It was initially presented to us as it was going to be an  
15 opportunity for us to learn more about the job. That there was  
16 going to be as much sharing. So it was going to be a  
17 traditional job interview. You learn as much about the job that  
18 you're going to get as explaining why you're qualified for.

19 And then the night before -- the meeting was to be on Monday  
20 and Tuesday. On Friday night at about 4:30, we got an e-mail  
21 from Block with an agenda that had a whole lot more on it than  
22 just, you know, let's get together and meet and talk.

23 Q And did you do any preparation for this meeting?

24 MR. WAYLAND: Your Honor, relevancy objection. I don't  
25 know where we're going here. We haven't put it at issue the

1 back and forth during the discussions. I don't really see why  
2 we're wasting anybody's time on this, your Honor.

3 THE COURT: Where are we going with all this?

4 MR. ROBERTSON: I'm going to a document that counsel  
5 used yesterday. Just trying to provide context for it.

6 THE COURT: Okay. Let's proceed.

7 MR. ROBERTSON: That's my next stop.

8 THE COURT: Okay. Good.

9 BY MR. ROBERTSON:

10 Q Sir, please turn in your small binder to Tab No. 6. Pardon  
11 me. Tab No. 9. And tell us what GX 28-43 here is, sir.

12 A This is a document that I created in preparation for the  
13 meeting on July 19th and 20th. And the expressed purpose of  
14 this was to get my board of directors and my investment banker  
15 off of my back because we got the agenda on Friday night. It  
16 included a lot of things that -- beyond just the typical  
17 discussion.

18 One of the things that Block had on the agenda was they  
19 wanted to have a discussion of product strategy and branding.  
20 And because the previous process had ended with the four  
21 founders being blamed for not being committed to the process, my  
22 board and investment bank was immediately all over trying to  
23 help us wanting to assist us in preparation. And numerous phone  
24 calls, numerous e-mails. It got terribly annoying. The four of  
25 us, the four founders, had already been discussing what we would

1 do to discuss branding and strategy.

2 In the previous two processes with Block when I had  
3 discussed this with Russ Smyth, we had had similar conversations  
4 but it had been around utilizing two brands. It had been about  
5 utilizing TaxACT as the value leader. At that time, Block was  
6 not promoting free, they were not doing anything with free, and,  
7 seemed to be scared of free. And so free -- taxACT was going to  
8 be the free vehicle for H&R Block because they weren't doing  
9 anything with free at that time.

10 And now we're going to do this branding strategy again with  
11 a new CEO. And so as part of that preparation for the job  
12 interview, we prepared for a discussion. And to have a  
13 discussion, we presume they wanted to go, again, with the  
14 dual-brand approach because that was the approach that made the  
15 most sense to us too, but in order to have a discussion, we had  
16 to have something to compare and contrast it to.

17 So over the course of Friday, Saturday, there was a lot of  
18 back and forths between the four founders preparing for that  
19 discussion. And this document was a summary of two options that  
20 we intended to present at that July 19th meeting as a basis, as  
21 a starting point, for discussing product positioning and  
22 branding strategy. So it was really just a tool for a job  
23 interview.

24 Q Did you actually give the document to the Block people?

25 A No. I only sent this to my board and to Jefferies to get

1     them off my back.

2     Q     All right, sir.  And there were two plans in here, a Plan B  
3     and a Plan T?

4     A     Yes.

5     Q     Was there an equal discussion about both?

6     A     No.  You know, I laid out the very basics of Plan B, you  
7     know, saying we could do one brand.  We could mix the current  
8     products under that one brand.  Use the TaxACT free as it  
9     existed at that point as a Block-branded product and promote the  
10    Block -- promote free inside the Block brand.  And that's about  
11    where the discussion ended.

12           Then they said, "Well, what's your other ideas?"  And so  
13    then we started talking about the dual-brand approach.  And most  
14    of the discussion -- we probably talked two or three minutes  
15    about Plan B and a half hour, 45 minutes about a dual-brand  
16    strategy.

17    Q     And the dual-brand strategy was Plan T?

18    A     Yes.  I mean, the discussion was all over the board, but it  
19    more closely represented Plan T than Plan B.

20    Q     And who actually drafted this document, sir?

21    A     I did.

22    Q     And on the last bullet point on "Marketing," it says, "Keep  
23    HRB free for use in search and limited home page exposure. Do  
24    not promote to the outside"?

25    A     Yes.

1 Q Where did this discussion go, if any, on that issue, sir?

2 A That is exactly what we were doing at that time frame. And  
3 they didn't have any problem with continuing to do that,  
4 although the discussion at that time was -- Russ Smyth was more  
5 vocal as the out going CEO about the flack that he was getting  
6 from franchisees and that he was very hesitant that we would  
7 promote Block free, you know, on their home page.

8 As long as it was hidden, as long as you could only get to  
9 it through search, free tax software, et cetera, he thought that  
10 was appropriate.

11 Q And that's what they were already doing at the time. Did  
12 that change at all after that, sir?

13 A Yes. Yeah, it changed for the next, which was last tax  
14 season where Block aggressively promoted free with the Block  
15 brand across all their preparation.

16 Q At the time, were you aware of any product Block had on the  
17 high end of their product group?

18 A Yes. It was their Best of Both product, which we discussed,  
19 you know, in detail as part of this dual-brand strategy. You  
20 know, I said that the important part -- my view was that to  
21 continue to promote the Block premium brand, we needed to  
22 differentiate it specifically against Intuit and that we needed  
23 to focus on permanent differentiators. We couldn't get tied  
24 into a feature war with Intuit. We had a feature. They had a  
25 feature. We had it the next year. It's like a cold war race.

1        Instead, we needed to focus on those things that were unique  
2        to those -- those assets that were unique to Block, which is  
3        their thousands of experienced tax preparers, that reputation  
4        and built-in tax expertise and knowledge. And we needed to  
5        incorporate that into the brand and specifically we needed to  
6        continue a product like the Best of Both. Perhaps not  
7        specifically that, but it had to be built upon the Block  
8        expertise and tie in to the assisted preparation model so that  
9        there was someone to help you, someone to back you up in your  
10       town.

11       It really addresses that lack of confidence that is a  
12       problem that has plagued DIY software. What happens to  
13       customers when they have something that causes them to lose  
14       confidence? They go to assisted. Eventually they come back.  
15       The important part is keeping those customers in the Block  
16       brand, providing them with the combination of tools that they  
17       can choose from that meet their needs at any one point in time,  
18       but that they can continue to choose and make that switch back  
19       and forth between assisted, DIY, DIY premium, DIY value,  
20       whatever meets their needs at that time.

21       Block needs -- and this was a discussion. Block needs to  
22       embrace that circular movement that's happening in the industry.  
23       They need to embrace it, and that's how they're going to  
24       separate and differentiate from Intuit. They are uniquely  
25       positioned to provide that service. Best of Both is what

1 they're currently doing.

2 THE COURT: And how will the dual-brand plan that I  
3 understand from the briefing in this case is the plan  
4 post-merger with TaxACT being a brand and H&R Block being a  
5 brand, help accomplish what you just talked about?

6 THE WITNESS: There are clearly customers in the tax  
7 market that are value conscious. Today, the Block brand does  
8 not service them. So we will continue to have -- in the  
9 combined organization, you'll have the DIY premium, you'll have  
10 the DIY value and you'll have the assisted. There will be the  
11 opportunity to tie in between assisted and TaxACT in the DIY  
12 value. It won't be just between Block assisted and Block DIY.

13 Regardless of what product meets your needs today, you  
14 need to have the option to pick the product that meets your  
15 needs in the future. So if you use TaxACT today and you lose  
16 confidence and you need help with assisted, you can go to a  
17 Block store and the Block store will be able to access your  
18 previous TaxACT return. And the reverse will be true. So when  
19 you regain confidence and you've prepared a return -- had a  
20 return prepared at a Block store, when you go to decide to go  
21 back to DIY, you'll have your choice of doing DIY premium or DIY  
22 value, and you'll have the opportunity to bring that data  
23 forward to your return.

24 It's going to be the -- you know, provide the optimal  
25 product mix to let the customer pick and choose what meets their

1 needs.

2 BY MR. ROBERTSON:

3 Q I think not to put words in the Court's mouth, I think we  
4 were trying to get out is this some plan to eliminate TaxACT?

5 A No.

6 Q Okay.

7 A No. Quite the opposite.

8 Q I think that's what I was hearing.

9 Sir, has the plan changed since then, since July of 2010?

10 A Yes. I mean, Block is aggressively promoting free both in  
11 their assisted and their DIY. So we would have -- we will  
12 incorporate that, and we will utilize that in the plan going  
13 forward.

14 Q And based on what's happened since then, do you think that's  
15 a good or bad idea?

16 A I think it's a good idea, yes. Free is here to stay. And  
17 whether you're assisted, whether you're premium, whether you're  
18 value, you know, free has universal appeal.

19 And like I said, we have to embrace that there's movement  
20 amongst all these preparation options and free is the -- that  
21 hook that applies to everyone.

22 Q Now, in your experience having gone from scratch as you've  
23 described and gone into the market with a tax preparation  
24 software product on two different occasions, from your  
25 experience, did the FFA help at all your company in expanding



1 and getting presence in the marketplace?

2 A Absolutely. It was a great springboard for us, and it is a  
3 fantastic low-cost, free marketing channel today. And every new  
4 entrant into the market starts with the Free File Alliance, and  
5 that's where they obviously can start building that reputation  
6 and track record.

7 Q In your experience, does the IRS check out the product  
8 before it goes on there or can just anybody put a product on  
9 there?

10 A There is a minimal check that the IRS does. It does not  
11 check the accuracy of the return, but it does make sure that you  
12 provide the services that you say you're going to provide and  
13 that your product does function.

14 Q Does it help at all in your experience for customers too  
15 find you on an IRS.gov Web site?

16 A Absolutely. You know, certainly for startups and for  
17 companies that don't have an established reputation, it is  
18 absolutely a seal of approval, as is the IRS E-file logo which  
19 everyone prominently displays on their Web sites.

20 Q You mentioned a number of smaller competitors out there,  
21 sir. Do those competitors have any effect on the way you do  
22 business, these smaller competitors in the value market?

23 A Absolutely. TaxSlayer and Free Tax USA are two that  
24 influence us the most in the value segment. Free Tax USA has an  
25 offer and a model that is almost exactly like ours. And in

1 fact, it's lower priced than ours today. And that is of  
2 concern.

3 Likewise, TaxSlayer has been very creative. They're still  
4 in the value segment. They don't compete with the same offer,  
5 but their offers are very creative and they are very creative in  
6 their marketing such as sponsoring NASCAR, college football  
7 games, and they're very creative and very efficient in how they  
8 use their online marketing spend. They're out there quite a  
9 bit.

10 Q Have you seen any activity in this business, this tax  
11 preparation business, on social media?

12 A Yes. Social media is, you know, I would say a component of  
13 virtually everybody's -- not just in tax software, in tax  
14 preparation, you have to be in social media, especially in  
15 places like Facebook. If people are saying things about your  
16 product, you need to respond. But it's also a great way. As an  
17 emerging channel, it hasn't quite been figured out. And there's  
18 a lot of opportunity there to exploit social media, especially  
19 for startups, whether it's Facebook, Twitter, et cetera.

20 Q And have you seen any activity on mobile-type Apps?

21 A Yes. Intuit is leading the way there with a mobile App  
22 called "SnapTax." A lot of companies have Apps that you can  
23 download that would allow you to do things like check the status  
24 of your return once you've E-filed it to check the status of  
25 your refund. Intuit's, I would say, far out in front of

1 everyone else with their SnapTax product.

2 I haven't actually tried it myself, but you can use your  
3 cell phone camera to take a picture of your W-2, and then it  
4 imports the data into your tax prep right on your phone. It is  
5 limited to pretty simple returns, but they're clearly way out in  
6 front of everybody else.

7 Q And speaking of social media again, if you'd turn to  
8 Tab No. 10, DX 5064. And just identify this for the record, if  
9 you can, sir.

10 A Yes. This is the social media plan that I believe that  
11 our -- Greg Hollingsworth, who was in charge of our social media  
12 group, put together.

13 Q I think that's enough of this document, sir. I think we all  
14 know what social media is. My children do. I don't think I can  
15 say very much about it.

16 Turning to shrink-wrap software. You mentioned to counsel  
17 that you had tried that once before. When was that?

18 A Well, we've never tried it directly, but we have at various  
19 times in our history, I think we were there probably in 2000,  
20 2001, 2003. I think there was three different vendors that took  
21 our product to retail. And each time they did it once or twice  
22 and then decided not to do it again. It was not a successful  
23 venture for them. And each one tried a slightly different  
24 tactic.

25 Q Why haven't you tried it yourself?

1 A It's very expensive and not something that I felt that there  
2 was a return on investment on. Especially with the TaxACT  
3 pricing, as the value leader, our product is very affordably  
4 priced and to start sharing that with third parties, nobody  
5 makes any money. There's just not enough to share.

6 Q And without getting into the actual contract documents,  
7 which we'll do in a closed session, can you tell us how it came  
8 about that you actually offered a shrink-wrap product just last  
9 year through a distributor.

10 A Yes. Avanguest, a distributor, approached us and asked if,  
11 you know, they could get, in essence, a licensing-type deal to  
12 take our product to retail.

13 Q And without getting into specifics, did you tell them what  
14 to do?

15 A No. We really have no expertise at retail and our  
16 experience has all been bad. The only thing we did -- if there  
17 was anything -- if there was any discourse at that time, it was  
18 are you sure you want to do this? You understand you're  
19 probably going to lose money. Why are you doing this? We  
20 wanted to make sure they were serious and not just, you know.

21 Q And without getting into the nitty-gritty details, was it a  
22 success last year?

23 A You know, I don't know how much money they made. I didn't  
24 really deem it a success. No, at 20,000 units, it's not a big  
25 event. It is a nonevent, which is consistent with our past

1 retail experience.

2 Q Now, what I'd like to do is before we go into the  
3 nitty-gritty details of things, just talk generally about the  
4 efficiencies, the synergies of the merger, all right, sir?

5 A Okay.

6 Q And I think you're aware of what you don't want to disclose  
7 to the public and what you do, so just make sure I keep the fine  
8 line here.

9 A Okay.

10 Q How far back had you had discussions, if any, with Block  
11 about the synergies of this deal?

12 A It was brought up in -- very loosely during the 2009 process  
13 but we learned nothing. I would guess that -- I would say that  
14 the only thing that we really learned in 2009 was that they did  
15 have three development teams that created their tax software and  
16 that the core synergy was going to be in consolidating that.

17 So Block has an entire development staff that creates their  
18 desktop product. They have an entirely different and separate  
19 staff that creates their online product. They have a completely  
20 different and separate staff that creates the software that they  
21 use in their assisted preparation business.

22 And we have one staff that, in essence, creates all three of  
23 those products. Our one staff is smaller in numbers than any  
24 one of their three. So at a high level, there was immediately  
25 an understanding that there was going to be a tremendous amount

1 of synergies from moving their development in operational  
2 infrastructure to utilize the TaxACT infrastructure.

3 Q Did you ever get any details back in 2009 as to what Block  
4 wanted to do?

5 A No.

6 Q Later in 2010, did you?

7 A Yes. We, again, starting with that meeting where Alan  
8 Bennett and Russ Smyth came to Cedar Rapids on July 19th and  
9 20th, we got, again, confirmation of what we had learned in 2009  
10 about how grossly inefficient they were in the software area  
11 and, you know, general discussion on other efficiencies that  
12 could be obtained but no specifics.

13 And we had come to that meeting -- again, the previous  
14 process had been -- the failure of the previous process had been  
15 blamed on us, and we had even at that time asked, "Well, what is  
16 the job we're going to do? What is it you're expecting of us?"  
17 So we had come to that meeting on July 19th and 20th, 2010, with  
18 a fairly comprehensive list of questions about what is it they  
19 do there and how they do it so that we can understand what it  
20 was we were going to be taking over.

21 But we didn't get any answers at that detailed level simply  
22 because the people that were there, Russ and Alan, weren't in a  
23 position to answer our questions.

24 Q Did there come a time when you were able to get the answers  
25 to those questions?

1 A Yes. We sent them a couple of documents. We sent them a  
2 list of questions about marketing and operations, and then we  
3 sent them a separate document about product development and IT.  
4 And I believe we sent both of those on July 27th of 2010. We  
5 got immediate feedback that the marketing list was way too  
6 detailed, and they weren't going to be able to provide all of  
7 those answers and that we needed to prioritize what we wanted  
8 answers to. So we had to reduce that list, and we sent them a  
9 reduced list then on the 28th.

10 But we didn't get any answers until I had another  
11 face-to-face meeting with Alan Bennett -- just Alan and I -- on  
12 August 3rd. And at that meeting, Alan came to Cedar Rapids, and  
13 I think he came to Cedar Rapids to address the issue about  
14 founders commitment and interest in this transaction. The  
15 reason that the previous transaction, we were told that it had  
16 failed. And -- excuse me; my throat's getting dry.

17 So he came to that meeting and explained to me a lot more  
18 about the role that he saw for myself and the four founders of  
19 2nd Story Software within --

20 Q What did he want you to do?

21 A He wanted us to take over the Block digital product. And it  
22 was obvious that he was very impressed with the unique asset  
23 that the four founders represented. We had a 20-year history of  
24 working together and not only working together, but being  
25 successful in working together; in essence, building two

1 products from scratch.

2 And he was very -- he admired the corporate culture of  
3 entrepreneurialism that we had built at 2nd Story. It wasn't  
4 just the four founders; it was everybody in the company that had  
5 the desire and the interest in controlling costs and providing  
6 the best customer experience possible. And he wanted to make  
7 sure that the four founders were going to stay in Cedar Rapids,  
8 and that TaxACT was going to remain in Cedar Rapids, and that  
9 the digital business would be moved to Cedar Rapids to  
10 perpetuate that entrepreneurial culture.

11 MR. ROBERTSON: Your Honor, I'll be going into more  
12 detail later. If your Honor wishes to, it would be a good point  
13 for a break. I do anticipate going into confidential  
14 material.

15 THE COURT: Okay. Well, what -- let me just see.  
16 Mr. Wayland, because what I was thinking about doing is doing  
17 all of the closed session all in one shot and then not going  
18 back into a public session with Mr. Dunn. So if that would work  
19 with the questioning of Mr. Wayland and with you, perhaps we  
20 can -- I don't know -- how long do you think that your redirect  
21 will be?

22 MR. WAYLAND: 15, half an hour maybe. I don't know.  
23 We can stop right now and be more efficient. It's a closed  
24 session.

25 THE COURT: Then we would have to go back to the public



1 session with Mr. Dunn. I think what I'd like to do -- just one  
2 second. If we can go off the record for a second.

3 (Discussion off the record.)

4 THE COURT: So Mr. Wayland, proceed.

5 MR. WAYLAND: Your Honor, may I approach the witness?

6 THE COURT: Yes, you may.

7 MR. WAYLAND: I'm going to hand to you what we've  
8 marked as Government Exhibit 9. I'm going to hand one to the  
9 witness, your Honor.

10 (WHEREUPON, a certain document was marked Trial Exhibit 9  
11 for identification as of September 8, 2011.)

12 REDIRECT EXAMINATION

13 BY MR. WAYLAND:

14 Q Mr. Dunn, I hate to revisit ground we've plowed before, but  
15 just so we leave no mistake about where these documents are  
16 coming from, we've put before you what we've marked as  
17 Government Exhibit 9. Again, this is -- if you look at the  
18 third page of the document, it's the 2009 Competitive Price  
19 Comparison.

20 Do you see that?

21 A Yes.

22 Q All right. And if you go back to the first page, again,  
23 this is information that comes from your counsel describing the  
24 nature of the document. If you go down, you'll see there's a  
25 number that says "2SSDunnLE003185."

1 Do you see that?

2 A Yes.

3 Q Do you see that that matches the number on the first page of  
4 the attached document 003185.

5 Do you see that, sir?

6 A Yes.

7 Q If you go down to the bottom of the page, it says, "File  
8 Path." This is the bottom of the first page of Trial Exhibit 9.  
9 It says, "File Path: Dunn, Lance hard  
10 drive/documentsandsettings/Lance/mydocuments/competitive  
11 analysis."

12 Do you see that, sir?

13 A Yes.

14 Q Does seeing this path give you any better recollection of  
15 where this document -- how this document wound up in your  
16 files?

17 A No. I mean, clearly it came from my hard drive, but no, I  
18 don't recall this document specifically.

19 Q And you see that it was -- "dup custodians" are listed at  
20 the top. That means that it resided in other people's files  
21 too.

22 So Kris Peterson, who is Kris Peterson?

23 A Vice president of marketing.

24 Q And who is Joanne Kintzel?

25 A She is the CFO.

1 Q And who is Cammi Greif again?

2 A Chief marketing officer.

3 Q All right. You can put that aside.

4 Now, sir, let me see if I can understand a few things about  
5 incentive. Today, where you sit as CEO of TaxACT -- we're on  
6 the right side of the column as you've described it, and we're  
7 looking at the chart where you described TaxACT on the value  
8 side, right?

9 A Yes.

10 Q And today, you'd want customers on the left side, anybody,  
11 if you can get them to come over to the right side, you'd take  
12 them, wouldn't you?

13 A I'll take customers from any source, yes.

14 Q And that's one of the reasons you have an ad out that  
15 compares the \$25 price of an Intuit product with the 13.95 price  
16 of a TaxACT product, right?

17 A We tried to show the pricing transparency issue in 2008.  
18 Was not successful for us, but we tried it.

19 Q All right. You tried it because you thought if you could  
20 convince people that you had a value at 13.95 versus the 25  
21 Intuit, they should come over to your side of the world,  
22 right?

23 A No. We were more concerned with people that were evaluating  
24 their options coming into the market. That they needed to make  
25 sure that as they were looking at their options and comparing

1 our solutions with that of TurboTax, that they understood what  
2 the pricing was going to be. We really weren't concerned  
3 about -- the people that had already used TurboTax, they already  
4 knew what the state price was. I didn't need to tell them. The  
5 only people that I needed to tell the state price to were people  
6 that hadn't used TurboTax before.

7 So I was more concerned about people that were coming into  
8 the market.

9 Q So you didn't think anybody was using TurboTax and saw that  
10 you were -- had just as good a product, a lot cheaper. You  
11 didn't think anybody was going to come over to your side of the  
12 world, right?

13 A It's a money-losing proposition to try and move people from  
14 one digital solution to another.

15 Q Well, don't you have an incentive to get people who are  
16 paying 25 bucks now to come over and pay 13.95 for your  
17 product?

18 A I have an incentive to move anybody regardless of their  
19 preparation solution last year to move to my product.

20 Q Right. So if people are at Block and they are paying \$25  
21 right now and you've got a product that's 13.95 and you think  
22 it's just as good, your motivation is to get those people to  
23 come over to your side, right?

24 A Yes. But only those people that are value conscious.

25 Only those people that are value conscious and price

1 conscious are going to make that switch. And they chose Block  
2 for a reason to begin with.

3 Q But there are some people you think you could get to come  
4 over who are paying \$25. If you can convince them to come over  
5 for 13.95, you'll take them, right?

6 A I would take them, but I'm not convinced that it's worth --  
7 you can't advertise to do that. That's why we don't run, you  
8 know, competitor-specific ads.

9 Q All right, sir. And today, two companies are separate.  
10 Block doesn't want anybody to go over to the 9.95 side. If  
11 you're that president of Block, you don't want the person who is  
12 paying you \$25 to head over and pay 9.95, right?

13 A In the environment that you're describing, it's more  
14 important to keep them in the brand. If someone is going to  
15 leave the brand because they're not happy with the value that  
16 you're providing, it would be more important to provide them  
17 with the solution that they're looking for but keep them in the  
18 brand.

19 Q This is a pretty simple question. If you're the head of  
20 Block and you've got a product for \$25, you'd rather keep that  
21 person buying your product than going over to you and buying  
22 your product for 9.95. That's pretty simple.

23 Yes or no?

24 A Yes.

25 Q And today, your motivation is to keep the guy who is paying

1 9.95 not to go over to the other side and pay \$25 to Block,  
2 right?

3 A Yes. We try to keep all of our customers happy.

4 Q All right. And after the transaction merges, you won't have  
5 that separate motivation anymore and Block won't have that  
6 separate motivation anymore because you're sort of mixed up now,  
7 aren't you?

8 A We will be combined.

9 Q And if you're losing those \$25 customers, they bring a lot  
10 more to the bottom line. That's not such a great thing, is  
11 it?

12 A If we're going to lose them, we're probably going to lose  
13 them anyway.

14 Q All right, sir. Now, Block and 2nd Story are both market  
15 free, as you've said, right?

16 A Yes.

17 Q And you have different ways of marketing free?

18 A Yes. We are marketing free to attract premium customers  
19 with Block and marketing free to attract value customers with  
20 TaxACT. That's a determination that that customer sees once he  
21 responds to the free ad.

22 Q And you have a big motivation to use your free to get those  
23 premium people to come over to your side, right, if you can get  
24 them over?

25 A Today, then, when?

1 Q Now.

2 A Now?

3 Q Yeah.

4 A Now?

5 Q Yes.

6 A Yes, we're trying to get everybody to try to come to  
7 TaxACT.

8 Q And you're differentiating your product right now --  
9 remember we did that little fishing story with two of you with  
10 your nets out in the water?

11 A Yes.

12 Q You need to differentiate your free product from H&R Block's  
13 to get people to come into your net, right?

14 A Yes. But the biggest differentiation is when you get to the  
15 TaxACT site.

16 Q All right, sir.

17 THE COURT: While you're moving on to another point,  
18 you made an interesting statement, Mr. Dunn, when you said that  
19 it was a money-losing proposition to try and move people from  
20 one digital solution to another.

21 Would you explain what you mean by that.

22 THE WITNESS: That, you know, to try and convince  
23 someone to leave the digital solution that they have already  
24 picked to come to yours, it's not worth it. You can't -- the  
25 cost of the advertising versus the returns that you're going to

1 get isn't worth the investment. So for example, we have done  
2 some bidding on competitive search terms, for example.

3 THE COURT: By that, do you mean that it just  
4 doesn't -- you know, if a customer's already with TaxSlayer, is  
5 already with H&R Block or with TurboTax, you've written off this  
6 consumer? It's a money-losing proposition to try and get them  
7 to use TaxACT?

8 THE WITNESS: To specifically target them, yes. To  
9 have a broadcast message out there and to cast a broad net and  
10 to catch any of those that are looking, you know, to move,  
11 regardless of their preparation method, works. But to  
12 specifically target and say, "Hey, TaxSlayer customers, you're  
13 paying 9.95 today, we'll give you 7.95," no, it won't work.

14 THE COURT: Is that because do-it-yourself software is  
15 software and once people have downloaded software, imported all  
16 their data to that software, it's very hard to get them to move  
17 to another software solution?

18 THE WITNESS: Yes. There is a stickiness. There is a  
19 familiarity. You're picking a tool that you feel comfortable  
20 with. That could be the interface, it could be the method that  
21 they gather the data. But you are comfortable and familiar with  
22 that after you've used it. To make a change and to suddenly do  
23 something differently is unfamiliar and uncomfortable. And the  
24 data is a big tie-in, yes.

25 THE COURT: Because I have seen -- not to bring us too



1 far off course, but in your document in the big notebook 13  
2 which is your -- you don't have to look at it. I'll just read  
3 it to you. This Government Exhibit 28-17 which has been talked  
4 about by both parties, there's one section of it that hasn't  
5 been talked about, and it refers to a bullet point for future  
6 planning. And it says, "Discussed if there is a way to import  
7 TurboTax online tax data as a potential plan."

8 So was -- have you thought about ways to remove -- to  
9 unglue, shall we say, to use your stickiness metaphor, to unglue  
10 some customers from their digital do-it-yourself solution to try  
11 out TaxACT?

12 THE WITNESS: Yes. It's impossible to import all of  
13 their data because that data resides on a server at Intuit and  
14 we're not going to be able to get access to it unless that -- we  
15 can't get there. But we do, this last year, provide a PDF  
16 import so if you used any product, whether it's brick-and-mortar  
17 assisted or another digital solution, there's a very good chance  
18 that they gave you a copy of your return from last year as a  
19 PDF, an electronic version of it.

20 And so we do now have an option to retrieve data from  
21 that, in essence, paper copy of your return. And we're trying  
22 it, but the results at this point are that, A, we're not getting  
23 a lot of people doing it; and B, they're not very happy with it.  
24 Because the amount of data that you can pull off of that paper  
25 return is pretty much name, address, Social Security numbers and

1 children's names and children's Social Security numbers.

2           When comparing that import option with what you would  
3 get if you import, you know, the data in the native format, then  
4 you can get carry forwards. You know, if you have your itemized  
5 deductions limited or passive activity loss limitations, you can  
6 carry that information forward. The details don't exist on the  
7 paper return. Pretty much all we can get -- and the other  
8 information that is repetitive-like W-2 providers, banks, 1099  
9 providers, that's also not available on the paper return.

10           So in comparing what you would get importing from year  
11 to year within a product versus what we can offer on PDF, people  
12 are not very happy with it. I'm not sure we're going to  
13 continue it.

14           THE COURT: Okay.

15           MR. WAYLAND: Thank you, your Honor.

16 BY MR. WAYLAND:

17 Q Mr. Dunn, let's talk about the concept of value again.  
18 Value is your basic business proposition, right? We offer more  
19 value than anybody else out there?

20 A That is a component of it, yes.

21 Q All right. So if you come to us and buy our product, you  
22 get better value than if you go to Intuit or Block, right?

23 A Value is in the eye of the beholder, yes.

24 Q But that's what you're -- we've seen document after  
25 document. That's what you say. We have high value, low cost,

1 right?

2 A Right. And that appeals to a customer that is value or cost  
3 conscious.

4 Q Okay. I'm sorry.

5 A It is, you know, whatever makes you comfortable to sign that  
6 line at the bottom that says, "I believe this return is true,  
7 correct and complete." If TaxACT provides that solution, that's  
8 great. But if you feel you need a safety in numbers from Intuit  
9 or if you feel you need the backup of H&R Block, that may be  
10 what that customer needs.

11 Q Yeah. Value, the way you're using it, is a quality, right?  
12 This is our quality. We have value. That's a quality about  
13 yourself that you're selling to people, right?

14 A Yes. We appeal to customers who are looking for a  
15 high-quality product at a low cost. And that's value.

16 Q That's your value proposition, right?

17 A Yes.

18 Q And each company on these charts has a value proposition of  
19 some kind. Come to us, we've got brand, that's our value,  
20 right?

21 A Yes.

22 Q Okay. Sir, if you would turn to Tab 2 of the binder that  
23 Mr. Robertson gave you. It's Exhibit DX 2200. This is the  
24 survey that Mr. Robertson had you look at.

25 A Yes.

1 Q First of all, do you have any particular training in the use  
2 or evaluation of survey data?

3 A No.

4 Q All right. And this survey was prepared by a company called  
5 "Zoomerang"?

6 A That's the tool that was used to execute the survey. It is  
7 an e-mail survey tool.

8 Q Who did the survey?

9 A Our marketing department would have used it -- would have  
10 prepared the survey using Zoomerang.

11 Q All right. If you'd turn to the second page down at the  
12 bottom, it says, "Copyright Market Tools, Inc., all rights  
13 reserved."

14 Do you see that?

15 A Yes.

16 Q Is this your document or is this a document prepared by some  
17 company for you?

18 A Zoomerang is a piece of software that allows you to send out  
19 surveys. They get the responses. They tabulate the results.  
20 So yes, this particular report comes out of their software  
21 product so, yes, it is copyrighted. You buy a license to it,  
22 and you can access this information online for a set period of  
23 time.

24 Q And you weren't -- I'm sorry.

25 A You have to re-up if you want to continue to access your old

1 surveys.

2 Q You weren't the person who actually conducted the survey,  
3 right?

4 A No.

5 Q How many people responded to the survey; do you know?

6 A Looks like 983.

7 Q 983. What's your customer base right now?

8 A For consumer tax software?

9 Q Tell me any of your -- however you want to measure it, sir.

10 A Yes. About 5 million.

11 Q So you got 900 responses, got 5 million people. You're  
12 quite happy to tell us about these results have meaning?

13 A No. 1, you're taking a pretty small slice here of the  
14 taxpayers. You're looking for people that were new in one year  
15 and didn't come back and online.

16 But, you know, for our purposes, yes, this confirms what we  
17 believed we already knew. This was confirmation.

18 Q Do you know anything about nonresponse bias in survey  
19 results?

20 A No.

21 Q If you look at Question No. 2, which is on the first page of  
22 the survey, it says, "If you didn't file your 2006 federal  
23 income tax return with TaxACT online, how did you file?" And  
24 then I guess it has a series of responses.

25 Were these responses provided for the survey respondents or

1 did somebody tabulate written responses? Do you know one way or  
2 the other, sir?

3 A I do not know.

4 Q All right. The list, as far as I can see, sir, has  
5 companies that are on the left side of the chart that you made  
6 yesterday, the premium side?

7 A Yes.

8 Q So I don't see anybody on the value side that's listed; is  
9 that right?

10 A Yes.

11 Q Okay. And I see that TurboTax is the -- "If you didn't file  
12 your 2006 federal income tax, how did you file it?" And the  
13 biggest number is TurboTax.

14 Does this mean people who went -- that's the largest  
15 destination of people who left TaxACT went to TurboTax?

16 A Prepared by hand is larger at 22 percent, and the  
17 combination of accountant and walk-in offices is larger at  
18 19 percent for assisted.

19 Q Yeah. I should have been clear.

20 With respect to digital competitors, right?

21 A With respect to digital, yes, it's the largest. But I think  
22 we've been talking about Intuit being 20 times bigger than  
23 TaxACT.

24 Q All right. Well, it's your survey. You offered it in. I'm  
25 just going through it with you.

1           Go to page 3, sir. It says -- second question, "If you  
2       didn't file your 2006 federal income tax return with TaxACT  
3       online, how did you file?"

4           And then if we look at the largest respondent in terms of  
5       where they went, it says "TurboTax Online"; is that right?

6       A    Yes. I was looking at who the survey went to, but yes.

7       Q    And again, that set of answers doesn't appear to have been  
8       an option for finding out if anybody went to a value player if  
9       they left tax online, right?

10      A    I don't know what the options were for the people that  
11      completed the survey.

12      Q    At least the options that are listed here, it doesn't list  
13      the value provider, does it?

14      A    It's not completed -- it's not included in this summary, no.  
15      I don't know what's in "Other, please specify."

16      Q    A question of the vibrancy of your value competitors. I  
17      think you talked about TaxSlayer and TaxHawk. And one of them I  
18      think you said, sir, has sponsoring NASCAR ads, I think you  
19      said, right?

20      A    Yes.

21      Q    And I think you said they were, quote, "very creative in  
22      what they did"?

23      A    Yes.

24      Q    And they have been around for a while, sir?

25      A    Yes. TaxSlayer has been around for quite a while.

1 Q And TaxSlayer and TaxHawk have been actively competing  
2 against you, and you're paying close attention to them.

3 You're worried about them, right?

4 A Yes.

5 Q Okay. In all the documents we've seen either shown by your  
6 counsel or by me listing these competitive charts, I didn't see  
7 them listed.

8 A I believe TaxSlayer was on one of those charts.

9 Q Would you agree, sir, that for the most part, when you're  
10 comparing your competitors, you've been limited to Intuit and  
11 H&R Block?

12 A Depends on the context.

13 Q All right. But the documents we've been looking at, right?  
14 We can look at them again, but I think you'll agree that the  
15 ones, for example, in the offering memoranda when you actually  
16 listed your competitors, instead of just talking about the  
17 market generally, it was Intuit and H&R Block and TaxACT,  
18 right?

19 A Yes. And I believe I covered why they were there.

20 Q Now, sir, you have a financial interest in this merger,  
21 don't you?

22 A Yes. I am a shareholder in 2nd Story Software.

23 Q And what's the value of those shares, your payout as a  
24 result of this transaction?

25 A Depends on how much this costs.



1 Q Can you answer my question, sir?

2 A Yes.

3 Q How much?

4 A Roughly 20 million.

5 MR. WAYLAND: All right. I have no more questions,  
6 your Honor.

7 MR. ROBERTSON: Your Honor, may I inquire?

8 THE COURT: Yes, please.

9 MR. ROBERTSON: I promise I will keep it short.

10 RECROSS-EXAMINATION

11 BY MR. ROBERTSON:

12 Q Just so we don't have any misunderstanding, sir, on Tab 2 of  
13 your small binder survey that your marketing department  
14 conducted, counsel said there were only 983 people who  
15 responded.

16 MR. WAYLAND: No. Actually, your Honor, the witness  
17 said that, not me. I asked the witness.

18 BY MR. ROBERTSON:

19 Q Well, then, let's turn to page 3. Do you see on page 3,  
20 1106 responded on that one?

21 A Yes.

22 Q Are these the same people that were on the first page?

23 A No. This is a different audience.

24 Q And when you answered counsel's question and said this was a  
25 particular slice, I think your word was, what did you mean by

1 that?

2 A It's a very specific audience that each survey was sent to.  
3 So in the example of page 1, that was to new -- customers who  
4 were new to TaxACT online standard and completed their returns  
5 in 2006 and then did not come back for 2007.

6 Q And going to page 5, do you see where there's a total of  
7 2,656?

8 A Yes.

9 Q Are these the same people we've already started to count up  
10 on the different pages?

11 A No. These would be unique again.

12 Q And turning then to page 7, 2,239?

13 A Yes. That would be unique. They're not the same as  
14 previous.

15 Q If I want to know what the total at least for the document  
16 that responded that counsel was asking you about, do I look at  
17 one of these numbers or do I add them together?

18 A I would add them together.

19 Q And counsel asked about your compensation or your interest  
20 in this deal. As you go forward, do you have any incentive in  
21 terms of what you get out of this deal as to what happens after  
22 you start running the entire software division of Block and  
23 TaxACT?

24 A Yes. I have a base salary and an incentive compensation  
25 plan and stock options.

1 Q And all those incentives that you get, can you just not push  
2 the TaxACT product as hard as you've been pushing it and get  
3 that?

4 A No.

5 Q How does it work? What's your understanding of it?

6 A We haven't worked out specifics because we're not sure when  
7 the deal will close so it's difficult to establish specific  
8 goals until we know when it starts, but some portion of it will  
9 be tied to achieving the synergies, the efficiencies that we  
10 talked about, and some percentage of it will be tied to the  
11 overall performance of the division.

12 Q And do you think if you took a strategy where you'd lose  
13 700,000 to a million customers, would that be good for your  
14 compensation?

15 A No.

16 MR. ROBERTSON: All right. That's all I have, your  
17 Honor.

18 THE COURT: All right. Let me just see if there's any  
19 re-redirect. Is there any re-redirect?

20 MR. WAYLAND: Just one question, your Honor.

21 FURTHER REDIRECT EXAMINATION

22 BY MR. WAYLAND:

23 Q Be good for compensation if you could get people to pay more  
24 for their product, right? More money in, compensation goes  
25 up?

1 A Like I said, we haven't worked out specifics.

2 Q It would be based on how much money you bring in, right?

3 A I presume that, yes, revenue and profits will both be a  
4 determining factor for the division.

5 Q So if you get more people to pay more money for a product,  
6 looks like it works out pretty well for you after the deal is  
7 done, right?

8 A Provided that you make the bottom line, but it's not just a  
9 one-year deal, it's multiple years, so I want to make sure I hit  
10 the next goal and the next goal after that too.

11 MR. WAYLAND: All right. Thank you.

12 THE COURT: Anything else?

13 FURTHER RECROSS-EXAMINATION

14 BY MR. ROBERTSON:

15 Q Simple question, sir. Can you raise prices on TaxACT and  
16 make more revenue?

17 A No. I mean, you might make it year one, but the whole model  
18 falls apart and you're going to lose customers wholesale and the  
19 whole thing falls apart.

20 MR. ROBERTSON: That's all I have, your Honor.

21 THE COURT: Mr. Wayland, I presume --

22 MR. WAYLAND: No, your Honor.

23 THE COURT: Okay. Good. All right. Then we are going  
24 to break for lunch until 5 after 2:00 when we will then go to  
25 our closed session.

1           For purposes of the spectators, can I get an estimate  
2   from counsel of how long you think the closed session will be so  
3   that they will know how long their lunch break can be.

4           MR. ROBERTSON: I'm guessing it's going to be about an  
5   hour for both of us, but I don't know how many questions he has.  
6   Could be an hour and a half.

7           THE COURT: Okay. Good. Thank you. I'll see you back  
8   at 5 after 2:00.

9           (Lunch recess taken at 1:03 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Lisa S. Schwam, certify that the foregoing is a  
correct transcript from the record of proceedings in the  
above-entitled matter.

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SIGNATURE OF COURT REPORTER

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DATE